IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4419

GLOBAL DIVERS & CONTRACTORS, INC.,
Plaintiff-Appellant,

VERSUS

LEEVAC CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana

(CV88-1884)

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.
JERRY E. SMITH, Circuit Judge:*

Global Divers and Contractors, Inc. ("Global") contracted with Leevac Shipyards, Inc. ("Leevac"), to

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

convert a vessel owned by Global. A fire damaged the vessel while Leevac was converting it. Global sued Leevac for the resulting damages. The district court granted summary judgment to Leevac, finding that Global had agreed in the contract, to release Leevac from any liability Leevac might have incurred. We affirm.

I.

In 1987, Global purchased the M/V WESTERN NARROWS, intending to convert it into a diving saturation vessel. In early 1988, Global started negotiations with Leevac about converting the vessel. These negotiations culminated in the signing of two documents on March 4, 1988: a Master Service Contract and a Work Order.

Paragraph 9.B. of the Master Service Contract states as follows:

> B. COMPANY [Global] agrees to release, protect, indemnify, defend and hold CONTRACTOR [Leevac] harmless from and against all liability, claims, demands and causes of action of every kind and character, including the cost of the defense thereof, for loss of or damage to property of the CONTRACTOR [sic: COMPANY] and its invitees, howsoever caused and even though caused by the negligence of the indemnified party, its invitees or anyone for whom they may be acting.

In addition, the parties defined the word "property" in paragraph 21.B. as follows:

> B. The term "property" as used herein shall mean all property (real or personal), equipment, material or supplies belonging to or leased by a party or its invitees.

On April 28, 1988, a fire broke out on the WESTERN NARROWS extensively damaging the vessel. In July, Global filed suit against Leevac and its insurers, alleging breach of contract and negligence in converting the WESTERN NARROWS.

Leevac moved for partial summary judgment in March 1991, arguing that the word "property" in paragraph 9.B. included the WESTERN NARROWS and thus that Global had agreed to release Leevac from any liability for damage Leevac might have caused to the vessel. The district court granted Leevac's motion, finding that "property" was not an ambiguous term, refusing to resort to parol evidence, and holding that the word "property" included the WESTERN NARROWS. The court absolved Leevac and its insurers from all liability.

II.

We review the district court's grant of summary judgment de novo. Edmundson v. Amoco Prod. Co., 924 F.2d 79, 82 (5th Cir. 1991). As did the district court, we look first to the language of the agreement into which the two parties entered. Paragraph 9.B of the Master Service Contract states that Global "agrees to release, protect, indemnify, defend and hold [Leevac] harmless from and against all liability, claims, demands and causes of action . . . for . . . damage to property of [Global] . . . howsoever caused and even though caused by the negligence of the indemnified party . . . ." (Emphasis added.) Paragraph 21.B then defines "property" as "all property (real or personal), equipment, material or supplies belonging to or leased by a party or its invitees."

Since the Work Order contains a choice-of-law provision designating Louisiana's as the applicable law, and since that law does not conflict with maritime law, we construe the parties' agreement accordingly. See Stoot v.

Fluor Drilling Servs., 851 F.2d 1514, 1517 (5th Cir. 1988). Article 2046 of the Louisiana Civil Code instructs us that "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." In interpreting contracts under Louisiana law, we repeatedly have declared that when the words of a contract are unambiguous, we shall not look beyond the agreement's four corners to interpret it. Godchaux v. Conveying Techniques, Inc., 846 F.2d 306, 315 (5th Cir. 1988). See also Davis v. Huskipower Outdoor Equip. Corp., 936 F.2d 193, 196 (5th Cir. 1991); Investors Assocs. Ltd. v. B.F. Trappey's Sons, Inc., 500 So. 2d 909, 912 (La. App. 3d Cir.), writ denied, 502 So. 2d 116 (La. 1987); Thomas v. Knight, 457 So. 2d 1207, 1209 (La. App. 1st Cir. 1984).

Following these principles of interpretation, we proceed to examine the language of the contract. First, the Master Service Contract states that Global agrees to release and indemnify Leevac against any claims for damage to Global's "property." The contract then defines property as "all property (real or personal) . . . ."

We find no ambiguity in this language. The plain meaning of the language is obvious. The parties' use of the word "property" in paragraph 9.B includes the vessel in question. We find that this must be so when another paragraph in the contract expands on the parties' meaning by defining "property" so broadly as to include all "real or personal" property.

Global asserts that by the word "property" it meant only equipment and supplies used to work on the WESTERN NARROWS, not the vessel itself. This argument fails in light of the broad definition of "property" in paragraph 21.B. If "property" meant only equipment and supplies, surely the parties would not have agreed to include real property in their agreement. We hold that the word

"property" in paragraph 9.B includes the WESTERN NARROWS.[1]

By finding that the term "property" in paragraph 9.B of the Master Service Contract includes the WESTERN NARROWS, we must conclude that Global has no claim for negligence against Leevac because, in paragraph 9.B, Global has agreed to indemnify Leevac against any damage it may have caused to the WESTERN NARROWS. Since Leevac is not liable to Global, neither are Leevac's insurers liable to Global.

Based upon our review of the plain meaning of the parties' agreement, we AFFIRM the grant of summary judgment.

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[1] In Todd Shipyards Corp. v. Turbine Serv. Inc., 674 F.2d 401, 423 (5th Cir.), cert. denied, 459 U.S. 1036 (1982), we stated that the ship KATRIN was "indisputably property other than the Insured's work product . . . ."

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4419

GLOBAL DIVERS & CONTRACTORS, INC.

Plaintiff-Appellant,

versus

LEEVAC CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING
(February 15, 1993)

Before REAVLEY, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

J. Smith
United States Circuit Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPEL0USAS DIVISION

GLOBAL DIVERS AND CONTRACTORS, INC.	*	CIVIL ACTION
VERSUS	*	NO. CV88-1884
LEEVAC CORPORATION, LEEVAC SHIPYARDS, INC., BOSTON OLD COLONY INSURANCE COMPANY AND LLOYDS OF LONDON AND INSTITUTE COMPANIES	*	SECTION "0"
	*	JUDGE SCOTT

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JUDGMENT

This matter having been considered by the Court on the Motions for Summary Judgment and/or for Entry of Final Judgment of defendants and the Court having ruled in favor of defendant and against plaintiffs on said Motions, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Leevac Corporation, Leevac Shipyards, Inc., The Boston Old Colony Insurance Company, and National Employers Mutual General Insurance Association, Limited, Chancellor Insurance Company, Ltd., Certain Underwriters at Lloyds, London appearing by and through their nominee, Bryan Jeffrey Hopwood and Certain Institute of London Underwriting Companies subscribing to that certain policy of insurance evidenced by policy number GCM-13263 and

against plaintiff, Global Divers & *Contractors, Inc.* dismissing all claims of Global Divers & Contractors, Inc., with prejudice, at plaintiff 's costs.

Alexandria, Louisiana, this 19th day of March, 1992.

Norman S. Scott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE DIVISION

GLOBAL DIVERS & CONTRACTORS, INC.	:	CIVIL ACTION
-vs-	:	NO. 88-1884
LEEVAC CORPORATION, ET AL	:	JUDGE SCOTT

RULING

Before the court are Motions for Summary Judgment filed on behalf of Leevac Corporation, (Leevac), its uninsured interests, Boston Old Colony Insurance Company (Boston) and National Employer's Mutual General Insurance Association Limited and Chancellor Insurance Company, Limited and Certain Underwriters at Lloyd's, London appearing by and through their Nominee, Bryan Geoffrey Hopwood, and Certain Institute of London Underwriting Companies, subscribing to that certain policy of insurance evidenced by Policy No. GCM 13263 (Lloyd's).

Global Divers & Contractors, Inc. (Global) sued Leevac and its insurers to recover damages sustained by fire of a Global survey vessel, the M/V WESTERN NARROWS, which was undergoing a conversion at Leevac's shipyard. Global also filed suit against Boston and Lloyd's pursuant to the Louisiana Direct Action Statute, LSH-R.S. 22:611. Global alleges that Boston had two insurance policies in effect which cover this loss: a Ship

Repairer's Legal Liability policy and a Builder's Risk Policy. Additionally, Global alleges that Lloyd's carried an excess policy which also covers the loss. In the alternative, Global asserts that Leevac was contractually liable for not providing such policies.

MOTION FOR SUMMARY JUDGMENT ON BEHALF OF LEEVAC'S INSURED INTERESTS

Leevac's Motion for Summary Judgment is based exclusively on the indemnity/release clause contained in Section 9B of the Master Service Contract (contract) executed by Global and Leevac in anticipation of the vessel's conversion. The provision reads as follows:

> Company agrees to release, protect, indemnify, defend and hold CONTRACTOR harmless from and against all liability, claims, demands and causes of action of every kind and character, including the cost of the defense thereof, for loss of or damage to property to the COMPANY and its invitees, howsoever caused and even though caused by the negligence of the indemnified party, its invitees or anyone for whom they may be action.

Master Service Contract, Section 9B.

In its Ruling of March 14, 1991, this court held that the term "property" as used in Section 9B of the Agreement included the M/V WESTERN NARROWS. This section requires us to grant Leevac's motion for summary judgment, dismissing it from all liability in this case.

We realize that this is a harsh, but unavoidable result. Even taking into account the rationale in Ogea v. Loffland Bros. Co., 622 F.2d 186 (5th Cir. 1980), Global's

claims must fail. Ogea compels us to view the contract as a whole, rather than focus only on the release/indemnity provision, to properly determine the contractual responsibilities of the parties. As this court ruled on March 14, 1991, this reading incudes [sic: includes] not only the insurance provisions contained in Section 8 of the contract, but the Work Order executed between the parties as well. Under Ogea, if Leevac has not met its obligations under the insurance provisions, it may not invoke protection under the release/indemnity clause of its agreement.

We first note that the contract is awkward at best and uncommonly ill-conceived. Many of the provisions have little or no application to the work for which Global contracted, and only the most strained reading makes some provisions relevant. The insurance provision is an excellent example. It calls for seven different types of insurance, the first five of which are third party policies: worker's compensation, employer's liability, maritime employer's liability, comprehensive general liability and automobile liability insurance.[1]

There is absolutely no reason why Global should require Leevac to carry policies such as automobile liability insurance, and to name Global as an additional named insured. Such coverage has nothing whatsoever to do with the conversion of the M/V WESTERN NARROWS, and makes no sense in the context of the contract.

BOSTON'S MOTION FOR SUMMARY JUDGMENT

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1 The last two listed are first party policies, P&I insurance and hull insurance, and only require Leevac to insure vessels used, possessed or controlled by Leevac to perform services pursuant to the contract. Any attempt to apply these to Global's property is wholly without merit.

Boston had two policies in effect with Leevac which are at issue in this case, a Ship Repairer's Legal Liability policy and a Builder's Risk policy. Boston has moved the court for summary judgment, asserting that the Global loss was not covered under either policy, and that it should be dismissed as a party to this case as a matter of law. In the alternative, Boston seeks summary dismissal of Global's claims against it on the basis that no applicable law grants Global any right of action against Leevac's insurers.

Direct Action Issue

We will first address Boston's argument on the applicability of the Louisiana Direct Action statute. Boston's argument with respect to the Builder's Risk policy is unnecessary, since for reasons hereinbelow set out we find that Boston has no liability for Global's loss under this policy.

Boston asserts that it cannot be sued directly by Global for the loss of the M/V WESTERN NARROWS under its Ship Repairer's Legal Liability policy because the Louisiana Direct Action Statute, LSA-R.S. 22:655, is not applicable to ocean marine insurance. We do not agree with this conclusion.

While it is true that LSA-R.S. 22:611 provides that the Louisiana Insurance Code "shall apply to insurance other than ocean marine and foreign trade insurances", we are bound by Coleman v. Jahncke Service. Inc., 341 F.2d 956 (5th Cir. 1965). In Coleman, the Fifth Circuit held that ocean marine insurances such as hull insurance were also public liability policies, subject to the Code, and therefore subject to the direct action statute. The court held that the direct action statute, by its terms, applies to every "policy or contract of liability insurance," and based its opinion on the holding Cushing v. Maryland Cas. Co., 198 F.2d 536 (5th Cir. 1952) reh. den'd 198 F.2d 1021, reversed on other

grounds, Maryland Casualty Company v. Cushing, supra. The Cushing court held that "[t]here is no indication in Sec. 655 that the Louisiana legislature intended to deny the right of direct action to persons covered by marine policies, while extending it to all others." Id. at 538.

We find that the definition of "ocean marine insurance" enacted under the Louisiana Insurance Guaranty Association ("LIGA") legislation at LRS-R.S. 22:1379(9) should not be superimposed on the entire insurance code. Delaune v. St. Marine Transp. Co., 749 F. Supp. 1463 (E.D. La. 1990). We hold that Global did have a right of direct action under LSA-R.S. 22:655 with respect to the Ship Repairer's Legal Liability policy.

Ship Repairer's Legal Liability Policy

Boston predicates its position with respect to the Ship Repairer's Legal Liability policy on Leevac's dismissal. Its policy contains a clause which essentially provides that no liability will attach under the policy until a final judgment has been rendered against the assured (Leevac) or until Boston has consented to liability. Since the effect of this ruling is to dismiss Leevac as a defendant, Boston's motion is granted with respect to the Ship Repairer's Legal Liability policy.

We must additionally note that the dismissal of Boston in this matter is not wholly dependent on the "no-action" clause of the policy. In Olympic Towing Corporation v. Nebel Towing Company, 419 F.2d 230, 237, 240, 241 (5th Cir. 1969), the court, citing Hidalgo v. Dupuy, 122 So.2d 639, 644-645 (La. App. 1960), held that the Direct Action Statute simply voids any policy clause which conditions the rights of an injured person on a judgment against the insured. Id. at 644-645. On rehearing, the Fifth Circuit reaffirmed its holding on this issue, stressing the point that it is the underlying liability of the assured, not the

liability of the insurer, which is to be determined. 419 F.2d at 241.

But even if we were to read out the "no action" clause, Boston would still not be liable, since it can only be liable to the extent its assured is liable. And as we already know, Leevac released and indemnified Global for property damage, in paragraph 9B of the Agreement. We cannot hold Leevac's insurers liable if Global released Leevac itself from liability.

Indeed designating Global as an additional named insured would not have put Global in any different position than it is now. Since the Ship Repairer's Legal Liability Policy is a third party policy, if Global had been named as an additional insured, Global only would have been covered for its liability as to third parties, not for its own first party claims. Thus, the fact that Leevac did not secure endorsement making Global a named insured is irrelevant, and Ogea is not decisive.

Builder's Risk Policy

Boston has also asserted that the Builder's Risk policy in effect at the time of the fire did not cover the M/V WESTERN NARROWS. While it is true that the policy in question was an "open" policy in that various projects could be readily added to the policy, Global's explanation of the manner in which this is accomplished is misleadingly simplistic. The policy itself, a copy of which is attached to Boston's Motion for Summary Judgement as Exhibit B, contains a page entitled "American Institute, Builder's Risk Clauses." Lines 12 through 16 describe the subject matter of the policy, being the hull, etc. "incorporated in or allocated to Hull No. ATTACHED type ATTACHED", and coverage is specifically limited "to the extent only that the cost of any of the foregoing is included in the Agreed Value." The obvious reading of this form is

that a covered vessel must be specifically described on an endorsement and the parties must establish an initial value. Additionally, the deposition of Irwin Cucullu, a representative of Laurence Eustis Insurance Agency, Inc., cited by Global, plainly states that the policy provides automatic coverage for new construction, but Mr. Cucullu set out a very different procedure for coverage on existing vessels with an existing value. Mr. Cucullu verifies in his deposition that an initial value of the vessel would have to be established and a premium would have to be negotiated and paid before work is started. The evidence in the record reflects that these conditions had not be fulfilled.

The fact that the Certificate of Insurance annexed to the contract indicated that the M/V WESTERN NARROWS was covered by Boston's Policy No. HB 740082 for Builder's Risk is irrelevant with respect to Boston's liability. A Certificate of Insurance cannot create or expand the terms of any insurance at issue. The Certificate merely indicates that a policy is in existence and provides some information about the policy. Atlas Assur. Co. v. Harper, Robinson Ship Co., 508 F.2d 1381, 1386 (9th Cir. 1975), quoting I. Arnould, Marine Insurance, at p. 138. We hold that Boston has no liability with respect to the loss in question under its Builder's Risk policy.

LLOYD'S MOTION FOR SUMMARY JUDGMENT

Lloyd's argues that if Leevac is not liable because of the indemnity provision, then Boston and Lloyd's cannot be liable to Global for its loss. Lloyd's policy is undoubtedly an "excess" policy, requiring that underlying coverage be effective. Since Leevac and Boston are not liable because of the release/indemnity provision, and the Builder's Risk policy was not effective, we must also hold that Lloyd's has no liability under its policy.

MOTION FOR PARTIAL SUMMARY JUDGMENT ON BEHALF OF LEEVAC'S UNINSURED INTERESTS

Leevac's uninsured interests seek a determination that Leevac had satisfied its contractual obligations to Global "by providing Ship Repairer's Legal Liability Insurance" and that it was under no obligation to provide Builder's Risk insurance.

First, as stated hereinabove, Leevac has satisfied its contractual obligations to Global with the Ship Repairer's Legal Liability policy at issue.

The other issue is whether or not Leevac was contractually obligated to furnish Builder's Risk insurance for the conversion. Builder's Risk insurance is not mentioned in the Work Order, nor is it enumerated as required insurance under Section 8 of the contract. It is only mentioned in the Certificate of Insurance attached to the contract.

Section 8B mandates that each insurance "required hereunder" be endorsed to Global as an additional named insured. There is no such necessity, however, for the policies listed on the Certificate of Insurance. So, since Builder's Risk was not a required insurance, there was no obligation on Leevac's part to have the policy endorsed to Global as an additional named insured. And, since Builder's Risk is a first party insurance rather than a third party insurance, Leevac's purchase of Builder's Risk insurance on the M/V WESTERN NARROWS would not have necessarily benefitted Global. Had the policy been endorsed to insure Leevac against loss of the hull of the M/V WESTERN NARROWS, Global could not have made a claim on such first party insurance under the Louisiana Direct Action Statute. And, since Global had the release/indemnity provision in Section 9B, Global could not have forced Leevac to make a claim on the policy. We hold

that Leevac's failure to list the hull of the M/V WESTERN NARROWS or to have Global listed as an additional named insured on its Builder's Risk policy does not constitute liability under the contract.

If Global had wanted its hull insured with Builder's Risk hull insurance, it should have required it be named as an additional named insured under such first party insurance. If Global had wanted its hull to be insured under a Ship Repairer's Legal Liability policy, it should not have agreed to release/indemnify Leevac in the same contract. "Release" and "indemnity" preclude "liability". The failure in this case is not in Leevac's conduct under the contract but in Global's failure to protect itself.

GLOBAL'S CONTRACTUAL CLAIMS

In its opposition to the foregoing motions, Global asserts that it may still maintain its breach of contract claims against Leevac for its obligations to (i) convert the vessel; (2) perform its task in a workmanlike manner; (3) comply with OSHA regulations; (4) comply with industry standards; and (5) obtain insurance.

As set out hereinabove, Global did, in fact, obtain the required insurance. As for the other claims, even Global admits that the indemnification provision of paragraph 10B specifically covers contractual claims, as opposed to paragraph 9B which covers property claims. Global Divers & Contractors, Inc.'s Memorandum in Opposition to Motions for Summary Judgment, p.13. In light of paragraph 10B, we hold the Leevac is completely indemnified by Global with respect to all contract claims.

Accordingly, the motions of Leevac's insured interests and uninsured interests as well as the motions of Boston and Lloyd's are hereby GRANTED.

DONE AND SIGNED at Alexandria, Louisiana, this 24th day of February, 1992.

Nauman S. Scott

UNITED STATES DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

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GLOBAL DIVERS & CONTRACTORS, INC., : Civil Action

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VS. No. 88-1884

LEEVAC CORPORATION, ET AL : JUDGE SCOTT

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RULING

Before the court is Global Divers & Contractors, Inc.'s (Global) Motion for Relief from the court's August 9, 1991 Ruling and/or to withdraw stipulation.

Global sued Leevac Corporation (Leevac) and its insurers to recover damages sustained by fire of a Global survey vessel, the M/V WESTERN NARROWS, that was undergoing a conversion at Leevac's shipyard.

In the joint Pretrial Stipulations filed by counsel on May 16, 1990, plaintiff, for the first time in this litigation, raised the issue of punitive damages, to which defendants objected as not timely. After extensive and deliberate negotiations, in June, 1990 all counsel agreed to amend the Pretrial Stipulations to reflect that Leevac and its insurers conceded negligence with respect to the fire and subsequent damage to the M/V WESTERN NARROWS, in return for Global's withdrawal of claims for punitive damages arising from their conduct in causing the damage. By letter dated May 24, 1990, counsel for Global acknowledged his

responsibility to prepare the amendment to the Pretrial Order and represented that he would do so.

On August 9, 1991 this court rendered a Ruling which reaffirmed its prior ruling that the term "property" in Section 9B of the Master Service Agreement included the M/V WESTERN NARROWS. This ruling effectively eliminated Global's claim for negligence against Leevac because Global had indemnified Leevac. Since LSA-C.C. art. 2004 excludes indemnity provisions with respect to intentional or gross fault, all Global had left were it punitive damage claims which it had just stipulated away. (This Ruling does not address Global's other claims against Leevac, such as breach of contract with respect to insurance coverage.)

Global failed to prepare the amendment to the pretrial order as required by its counsel's letter of May 24, 1990, so that the agreed stipulation is not of record. Within days after the August 9, 1991 Ruling, defendants and the court received a letter from Global withdrawing its stipulations and effectively breathing new life into its punitive damage claim. The questions is: can such withdrawal be allowed over the objection of Leevac?

This is not a stipulation of fact which is now known to be untrue or a motion to include in the Pretrial Order punitive damages not previously raised, which would be subject to an entirely different review. See McFadden v. Sanchez, 710 F.2d 907 (2nd Cir. 1983). In fact, all the cases cited by Global are instances where a court is asked to include causes or evidence which should have been obvious to all parties from the beginning. Plaintiff herein seeks to exclude a stipulation to which it previously agreed.

Fed. R. Civ. P. 16(e) allows for modification of a pretrial order "only to prevent manifest injustice". An extensive discussion of amendments to pretrial orders is

contained in Christenson, The Pre-Trial Order, 29 F.R.D. 191 (1961). This discourse points out that these orders should be respected because they govern the pattern of the trial and that "too-easy modification" encourages carelessness. It points out that agreements made by counsel and incorporated into the pretrial order are binding in character, and that if the court cannot rely on the admissions of counsel, the pretrial conference has no validity. Id. at 373. The seminar also reviews "a variety of opinion as to the trial court's discretion to order modification and amendments of the pre-trial orders under particular circumstances arising from the discovery of new facts and issues after the pre-trial hearing." Id. at 371-372, (Emphasis added.) Provision is also made for admissions of counsel which were obtained through "fraud or over-reaching." Id. at 373. The case at bar contains no such extenuating circumstances. Rather, Global is asking to amend based solely on the ground that it miscalculated what the court's ruling would be, and lost at the wagering table. In effect, it seeks to renege on its bet. If the rules and cases charge this court to base its decision on "avoiding injustice," our only result can be to rule that the June, 1990 Stipulations stand as they are. To rule otherwise would be an injustice to Leevac.

Plaintiff seeks to distance itself from the agreed upon stipulations by asserting (1) that the amendments were inchoate and that there was no "final revision" and (2) that there was a "misunderstood agreement between counsel what claims and damages were to be withdrawn by Global." Global's memorandum, page 4. This contention is not supported by the record.

By letter of May 24, 1990, Global offered to agree to the three amendments, which were clearly set out. By letter of June 5, 1990, Global agreed to modify its stipulations withdrawing "any claims for punitive damages." The paragraph was carefully crafted, and set out, indented

and single spaced, in quotation marks. The language was clear. If there was a misunderstanding on Global's part, any such ambiguities are to be construed against the drafter, Global. The three stipulations were accepted verbatim by defendants in correspondence dated June 7, 1990. All that was remaining was Global's agreed obligation to include them in the record. It would be unfair at this point to allow Global to retreat from its agreement.

It should be pointed out that these stipulations were in effect for fourteen months before Global attempted to withdraw them. Not only did Global sit back and allow Leevac to rely on them, but allowed the court to rely on them as well, before anyone received notice of Global's intentions. (See Ruling, August 9, 1991, footnote 1.) It would be patently unfair to force both defendants and the court to turn the clock back and re-do the past 14 months because Global decided to change its mind. United States v. State of Texas, 523 F.Supp. 703, 714 (E.D. Tex. 1981).

Global's motion for relief from the court's August 9, 1991 Ruling is without merit. We cannot consider reformation of the contract at issue in this case; parol evidence is inadmissible when the language of the contract is clear. Texaco, Inc. v. Newton and Rosa Smith Charitable Trust, 471 So.2d 877, 881 (La. App. Ct. 2d Cir. 1985).

Accordingly, Global's Motion for relief from the court's August 9, 1991 Ruling and/or to withdraw proposed stipulations is hereby DENIED.

DONE AND SIGNED at Alexandria, Louisiana, this 11th day of October, 1991.

Nauman S. Scott
UNITED STATES DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

GLOBAL DIVERS & CONTRACTORS, INC.,	: Civil Action :
	: No. 88-1884-0
Vs.	:
	: JUDGE SCOTT
LEEVAC CORPORATION, ET AL.	: :

RULING

Before the court is plaintiff Global Divers & Contractors Inc.'s (Global) Motion to Reconsider our Ruling of March 14, 1991 (copy attached). In that Ruling, we held that the term "property," as used in Section 9B of the "knock-for-knock" indemnity clause of the Master Service Agreement between Global and defendant Leevac Corporation (Leevac), was unambiguous and included the vessel the M/V WESTERN NARROWS.

Although we determined that Section 9B's use of "property" was unambiguous, and therefore excluded parol evidence to explain or contradict the meaning of the term, we then supported our holding that "property" included the M/V WESTERN NARROWS with evidence culled from the contract negotiations between Global and Leevac. Specifically, we stated that "the negotiations which led to the creation of the "knock-for-knock" indemnity and release provisions demonstrate that the parties intended "property," as used in Section 9B, to include the M/V WESTERN NARROWS." Ruling of March 14, 1991 at 7. Clearly, this was an impermissible use of parol evidence. However, because we used parol evidence despite having excluded it, Global now contends that we should consider a plethora of

additional parol evidence which, in Global's opinion, demonstrates that the parties never intended "property" to include the M/V WESTERN NARROWS.

We must decline Global's attempt to capitalize on our erroneous use of parol evidence because, even without the above quoted passage, which we now withdraw as support for our holding that the parties intended "property" to include the M/V WESTERN NARROWS, we still conclude that "property" included the M/V WESTERN NARROWS because there is no other way to interpret the contract documents without rendering meaningless other parts of the instrument. Section 21B of the Master Service Agreement defines "property" to "mean all property (real or personal), equipment, material or supplies belonging to a party or its invitees." If we were now to exclude the M/V WESTERN NARROWS from the definition of property, we would have to either ignore or rewrite Section 21B of the Master Service Agreement. We find no basis to do so.

Alternatively, Global asserts that we overlooked the fact that Louisiana law does not permit indemnity clauses seeking to release a party in advance for gross negligence. The first sentence of Civil Code article 2004 provides that "[a]ny clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party." La. Civ. Code art. 2004. Thus, it is clear from the first sentence of article 2004 that Louisiana law will not permit such clauses. However, the fact remains in this instance that Global relinquished any claim it may have had alleging that Leevac was grossly negligent in causing the fire when it entered into a stipulation absolving Leevac of any such gross fault.[1] As

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[1] The Second Cause of Action of Global's sole complaint against Leevac stated in Paragraph XII:

(continued...)

[1](...continued)

"The aforementioned fire damage to the M/V WESTERN NARROWS was caused by the recklessness, carelessness and negligence of Leevac . . . ." The Third Cause of Action stated in Paragraph XVII: "The bad faith refusal of defendants to provide insurance coverage for the damages sustained by Global gives rise to punitive damages and/or attorney fees under applicable law . . . ." Although the prayer for relief requested "punitive damage and/or penalties and attorney fees be awarded in an amount determined by the court," it is questionable whether either of these allegations or the prayer for relief can be interpreted as raising a claim for punitive damages based on Leevac's fault in causing the fire even under the liberal notice pleading requirements prevailing in federal court.

However, despite the possibility that Global failed to properly plead a claim of gross negligence against Leevac for causing the fire, Global ultimately raised such a claim in the proposed Joint Pretrial Stipulations of May 1990. There, Global stated that defendants were liable to plaintiff for "punitive damages for . . . gross negligence . . . for the conversion of the M/V WESTERN NARROWS to a diving support vessel to be known as then GLOBAL 1000," and that the "damage caused to the plaintiff was due to the willful and wanton negligent conduct of Leevac."

At this point, Leevac filed a Motion to Strike Global's claim for punitive damages for Leevac's fault in causing the fire and to strike the predicate allegations of gross negligence and willful,

(continued...)

[1](...continued)

wanton misconduct. However, the Court never ruled on this motion because Leevac and Global thereafter entered into the stipulation mentioned in the text. The stipulation stated in relevant part:

> 10. Leevac Shipyards and its Shiprepairer Liability insurers stipulate that the fire and subsequent damage to the M/V WESTERN NARROWS which occurred on or about April 28 and 29, 1988 was caused by the negligence and fault of Leevac Shipyards and/or its employees and/or persons for whom Leevac Shipyards was responsible.
>
> 12. Global withdraws any claims for punitive damages and exemplary damages against Leevac Shipyards, Inc., Leevac Corporation and its liability insurers concerning the conduct of Leevac arising out of the fire and damage to the M/V WESTERN NARROWS, but reserves all claims for statutory penalties and attorneys' fees against Leevac and its insurers asserted as the Third and Fourth Cause of Action in the original complaint.

Thus, there is no doubt that Global waived any claim it may have had against Leevac for punitive damages for Leevac's fault in causing the fire. Because punitive damages cannot be awarded

(continued...)

such, Leevac's alleged gross negligence in causing the fire is not at issue in this case. Therefore, the first sentence of article 2004 does not prevent operation of the indemnity clause relieving Leevac of liability for the damage caused to the M/V WESTERN NARROWS.

Finally, Global asserts that even without a claim of gross negligence, the indemnity clause is nonetheless void because the second sentence of Civil Code article 2004 nullifies any clause which, "in advance, excludes or limits the liability of one party for causing physical injury to the other party." La. Civ. Code art. 2004. As support for this contention, Global points to Ramirez v. Fair Grounds Corp., 575 So.2d 811 (La. 1991).

In Ramirez, the plaintiff, a licensed racehorse trainer, was injured in a stable accident at the Fair Grounds in New Orleans. The plaintiff filed suit alleging that the Fair Grounds was strictly liable for his injuries pursuant to Civil Code articles 2317 and 2322. Thereafter, the defendant filed a motion for summary judgment based on a release agreement signed by plaintiff approximately four months before the accident. The agreement purportedly

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[1](...continued)
without a finding of gross negligence, see Miles v. Melrose, 882 F.2d 976, 989 (5th Cir. 1989), the obvious conclusion is that this stipulation absolved Leevac of any allegations of gross negligence in causing the fire when the claim for punitive damages was withdrawn. The fact that Global may have reserved its claim for punitive damages for Leevac's alleged failure to provide insurance coverage does not affect the operation of the indemnity clause because a bad faith breach of a contractual term is not tortious fault. Thus, it does not trigger the first sentence of article 2004.

released, indemnified, and held the Fair Grounds harmless from any and all liability for the plaintiff's injuries. Finding that the agreement was not barred by article 2004, the lower courts agreed with defendant and dismissed plaintiff's suit.

The Louisiana Supreme Court reversed. Although the redactor's comments to article 2004 clearly indicated that the article was not intended to apply to indemnity or hold harmless agreements,[2] the Louisiana Supreme Court held that article 2004 "is clear and unambiguous," and therefore must be "applied as written." Id. at 813. Based on this literal approach, the Louisiana Supreme Court concluded that the release agreement was null because it, "in advance, exclude[d] the liability of the Fair Grounds for causing physical injury to Ramirez." Id.

Adopting the "applied as written" approach of the Louisiana Supreme Court, we find that the second sentence of article 2004 focuses on the term "physical injury." Black's Law Dictionary defines "physical injury" as "bodily harm or hurt, excluding mental distress, fright, or emotional disturbance." (Emphasis added.) Black's Law Dictionary 1147 (6th ed. 1990). Similarly, the term "physical" is individually defined as "relating or pertaining to the body, as distinguished from the mind or soul or the emotions." Id.

Given these definitions, a literal interpretation mandates the conclusion that article 2004 does not by its own terms nullify indemnity clauses which, in advance, exclude or limit liability for property damage as distinguished from physical, bodily damage. We hold

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2 Comment (e) to article 2004 states that the article "does not govern 'indemnity' clauses, 'hold harmless' agreements, or other agreements where the parties allocate between themselves the risk of potential liability towards third persons."

therefore that the indemnity clause at issue in this case is as unaffected by the second sentence of article 2004 as it is unaffected by the first sentence of the article.

Accordingly, we **DENY** Global's Motion to Reconsider.

DONE AND SIGNED at Alexandria, Louisiana this 9th day of August, 1991.

Nauman S. Scott

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

GLOBAL DIVERS & CONTRACTORS, INC.	: CIVIL ACTION
-vs-	: NO. 88-1884-0
LEEVAC CORPORATION, ET AL	: JUDGE SCOTT

RULING

Before the court are three Motions. The first is defendant Leevac Corporation's (Leevac) Motion for Partial Summary Judgment. The second is plaintiff Global Divers and Contractors, Inc.'s (Global) Motion to Reconsider Judge Shaw's Ruling of March 31, 1989 (copy attached) in which Judge Shaw denied Global's Motion for Partial Summary Judgment. The third is Global's Appeal of Magistrate Ivan Lemelle's Ruling of September 6, 1990.

Global sued Leevac and its insurers to recover damages sustained through fire by a Global survey vessel, the M/V WESTERN NARROWS, that was undergoing a conversion at Leevac's shipyard. The casualty occurred on April 28, 1988.

The pivotal issue in this case, and the subject of the three motions now pending before the court, concerns the meaning of the term "property" in the "knock-for-knock" release and indemnity provisions of the Global-Leevac Master Service Agreement signed on March 4, 1988. Leevac contends that "property" includes the M/V

not include the vessel. The Master Service Agreement provided in Sections 9A and B:

> 9.A. CONTRACTOR [Leevac] agrees to release, protect, indemnify, defend and hold COMPANY [Global] harmless from and against all liability, claims, demands and causes of action of every kind and character, including the cost of defense thereof, for loss of or damage to property of the CONTRACTOR and its invitees, howsoever caused and even though caused by the negligence of the indemnified party, its invitees or anyone for whom they may be acting.
>
> 9.B. COMPANY agrees to release, protect, indemnify, defend and hold CONTRACTOR harmless from and against all liability, claims, demands and causes of action of every kind and character, including the cost of defense thereof, for loss of or damage to property of the COMPANY and its invitees, howsoever caused and even though caused by the negligence of the indemnified party, its invitees or anyone for whom they may be acting.

In its Motion for Partial Summary Judgment, Leevac contends that there is no ambiguity with regard to the definition of "property," and therefore, parol evidence as to the meaning of this term should be excluded. Citing the Ruling of March 31, 1989, Global asserts that this court has already held "property" to be ambiguous. Global also contends that the parol evidence rule does not govern the question presented by Leevac's motion in any event.

Contrary to Global's assertion, this court has never decided whether the language in the release and indemnity provision is ambiguous or unambiguous. The Ruling of

March 31, 1989 stated: "Even if the language in paragraph 9B is ambiguous, which it is not necessary for this court to decide at this time, a genuine issue of material fact exists, among other things, as to the intentions of the parties regarding paragraph 9B." Ruling of March 31, 1989 at 3 (emphasis added). Thus, the question of ambiguity remains open.[1]

As to the merits of Leevac's Motion for Summary Judgement, we must first define the scope and nature of the "contract" in question. Specifically, what document or documents form the "contract," and is the "contract" a maritime contract governed by federal law or an ordinary contract subject to state law?

A master service agreement becomes binding only upon issuance of a work order. Matte v. Zapata Offshore Co., 784 F.2d 628, 630 (5th Cir. 1986); Page v. Gulf Oil Corp., 775 F.2d 1311, 1315 (5th Cir. 1985) (master service agreement not a binding contract but "merely sets out the rules of the game in the event that the parties decide to play ball."). Thus, we must include the Work Order in our determination.

Similarly, where insurance procurement clauses require, as here, that the indemnitor be named as an additional named insured under the indemnitee's policies,

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1 Judge Shaw's statement that there is "a genuine issue of material fact . . . as to the intentions of the parties regarding paragraph 9B" is predicated on the conflicting testimony of Messrs. Burke and Burrell. Because consideration of parol evidence requires first a finding of ambiguity, Judge Shaw's statement could give rise to the belief that the ambiguity issue had been settled. Clearly, however, no such decision has been made.

the insurance provisions must be considered in interpreting the indemnity provisions. Ogea v. Loffland Bros. Co., 622 F.2d 186, 189 (5th Cir. 1980). Thus, we hold that we must examine not only the Master Service Agreement but also the Work Order and Insurance Certificates in construing the meaning of the release and indemnity provisions in sections 9A & B of the Master Service Agreement.

Ordinarily, a contract for the repair and conversion of a vessel is a maritime contract subject to federal law. Alcoa Steamship Co. v. Charles Ferran & Co., 383 F.2d 46, 50 (5th Cir. 1967). The interpretation of an indemnity clause in a maritime contract is also ordinarily governed by federal maritime law rather than state law. Theriot v. Bay Drilling Corp., 783 F.2d 527, 538-39 (5th cir. 1986). The applicability of state law is limited to those issues not governed by maritime law and to the extent that state law is not destructive to the uniformity sought under admiralty law. Alcoa, 383 F.2d at 50.

"However, under admiralty law, where the parties have included a choice of law clause, that state's law will govern unless the state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purposes of maritime law. Stoot v. Fluor Drilling Services, Inc., 851 F.2d 1514, 1517 (5th Cir. 1989). The Work Order, which incorporates by reference the Master Service Agreement, provides that the contract shall be governed by Louisiana law. We find no impediment to the application of Louisiana law. Thus, we shall examine this contract pursuant to Louisiana's rules of contract interpretation.

In Louisiana, the codal articles on contract require that we determine the intent of the parties, as expressed in the contract documents, without rendering any part of the entire instrument meaningless. La. Civ. Code Arts. 2045, 2050 (West Supp. 1986); Massie v. Inexco Oil Co., 798 F.2d

777 (5th Cir. 1986). Where the words are clear, explicit, and lead to no absurd consequences or violation of public policy, "the meaning and intent of the parties must be sought within the four corners of the instrument and cannot be explained or contradicted by parol evidence." Texaco, Inc. v. Newton and Rosa Smith Charitable Trust, 471 So.2d 877, 881 (La. App. Ct. 2d Cir. 1985). Additionally, words of contract must be given their generally prevailing meaning. Diefenthal v. Longue Vue Management Corp., 561 So.2d 44, 51 (La. 1990). However, when the terms of a written contract are susceptible to more than one interpretation, or there is ambiguity or uncertainty as to its provisions, or the intent of the parties cannot be ascertained from the language employed, parol evidence is admissible to clarify the ambiguity and to reveal the intention of the parties. Id.

First, we hold that public policy is not a basis for resort to parol evidence because Louisiana law recognizes that exculpatory clauses relieving liability for a person's own negligence are not contrary to public policy. Farrell Const. Co. v. Jefferson Parish, 693 F. Supp. 490, 493 (E.D. La. 1988). We also hold that there is no ambiguity regarding the meaning of "property" as used in the release and indemnity provisions of the Master Service Agreement.

Although the Master Service Agreement, the Work Order, and the Insurance Certificates refer, at times, explicitly to the "vessel," a distinction is drawn between the vessel and other forms of property only in the Insurance Certificates and then, solely for the purpose of denoting the different layers of insurance. Additionally, Section 21B of the Master Service Agreement defines property to "mean all property (real of personal), equipment, material or supplies belonging to or leased by a party or its invitees" (emphasis added). Given this definition, as well as the "plain meaning" of "property," we agree with Leevac's assertion that "property," as used in the release and indemnity provisions,

is not an ambiguous term. Therefore, we hold that there is no need to resort to parol evidence to clarify its meaning.

Although Leevac has not requested this court to render a ruling on the interpretation of Section 9B, Global's Motion to Reconsider Judge Shaw's Ruling of March 31, 1989 provides the opportunity to make an interpretation. We hold that "property," as used in Section 9B, includes the M/V WESTERN NARROWS.

At the outset of the negotiations, the Master Service Agreement, a Global form document, did not include Section 9B. Upon reviewing the proposed Master Service Agreement, Leevac's attorney, James G. Burke, objected to the broad and all-inclusive indemnity and release language now identified as Section 9A. However, Global refused to withdraw that provision. The dispute was finally resolved when Global agreed to Mr. Burke's demand that Leevac be afforded an identically broad and all-inclusive release and indemnity provision now identified as Section 9B. An examination of the Sections 9A and B reveals that they are absolutely identical except for the identification of the indemnitor and indemnitee. In light of the definition of "property" in Section 21B of the Master Service Agreement, we hold that the negotiations which led to the creation of the "knock-for-knock" indemnity and release provisions demonstrate that the parties intended "property," as used in Section 9B, to include the M/V WESTERN NARROWS.

Our holding that "property" is not an ambiguous term, and the conclusion that "property," as used in Section 9B, includes the M/V WESTERN NARROWS, moots Global's Appeal of Magistrate Lemelle's Ruling of September 6, 1990, and also requires this court to deny the relief sought by Global in its Motion to Reconsider Judge Shaw's Ruling of March 31, 1989. We hasten to add, however, that these conclusions doe not resolve whether Leevac's insurers are free of liability.

DONE AND SIGNED at Alexandria, Louisiana this 14th day of March, 1991.

Nauman S. Scott
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

GLOBAL DIVERS AND CONTRACTORS, INC.	CIVIL ACTION NUMBER 88-1884
VS.	SECTION 0 - JUDGE SHAW
LEEVAC CORPORATION, ET AL.	MAGISTRATE METHVIN

RULING

Now before this court is a motion for partial summary judgment filed by plaintiff, Global Divers and Contractors, Inc. ("Global") on the issue of liability alone.

Global and Leevac Shipyard, Inc. (Leevac) entered into a Master Service Contract Agreement in which Leevac agreed to convert the M/V Western Narrows from a geophysical research vessel into a diving support and construction vessel. Global owned the vessel. While the vessel was at Leevac's pursuant to the contractual agreement for repair/conversion, the vessel caught fire and burned. Global now moves for partial summary judgment claiming that the damage to the M/V Western Narrows was caused by the fault/negligence of Leevac and its insurers are responsible to Global for this loss. The parties have briefed the issues thoroughly and this court denies Global's motion for partial summary judgment for the following reasons.

Fed. R. Civ. P. 56 provides that a judgment shall be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

To state it succinctly, genuine issues of material fact exist in this case. Paragraphs 9A and 9B of the Master Service Contract Agreement are reciprocal indemnity clauses between Leevac and Global. These provisions provide:

> 9.A. CONTRACTOR agrees to release, protect, indemnify, defend and hold COMPANY harmless from and against all liability, claims, demands and causes of action of every kind and character, including the cost of the defense thereof, for loss of or damage to property of the CONTRACTOR and its invitees, howsoever caused and even though caused by the negligence of the indemnified party, its invitees or anyone for whom they may be acting.
>
> B. COMPANY agrees to release, protect, indemnify, defend and hold CONTRACTOR harmless from and against all liability, claims, demands and causes of action of every kind and character, including the cost of the defense thereof, for loss or damage to property of the COMPANY and its invitees, howsoever caused and even though caused by the negligence of the indemnified party, its invitees or anyone for whom they may be acting.

THE parties dispute what was intended by these provisions. Global argues, based on several different theories, that this indemnity provision does not operate to keep Leevac from being liable for the fire (assuming for purposes of this ruling that Leevac was in fact responsible for the fire). They assert (1) the term "property" does not include vessel, (2) the term "claims" does not include claims by Global and (3) that the provision is against public policy. New Zion Baptist Church v. Mecco, Inc., 478 So.2d 1364

(La.App. 4th Cir. 1985). Global also makes a number of arguments that logically they could not have intended this clause to relieve Leevac from liability because that would not make sense. In opposition to the motion for summary judgment, Leevac and its insurers essentially argue that the language of Paragraph 9B is not ambiguous, therefore parol evidence should not be allowed. In re Cajun Electric Power Co-Op., Inc., 791 F.2d 353 (5th Cir. 1986).

Additionally, there are several issues concerning the various insurance policies in effect and available that affect the outcome of this case. Global relies primarily on the testimony of Charles Burrell, Sales Manager and Secretary-Treasurer of Leevac Shipyards, to support their argument regarding the parties' intentions. (Burrell depo. pp. 5-7). Mr. Burrell did not intend the term "property" in paragraph 9B to include vessel. However, James Burke, Leevac's attorney, stated that he took "property" to mean vessels, dry dock, machinery and equipment. (Burke depo. pp. 60-61). Even if the language in Paragraph 9B is ambiguous, which it is not necessary for this court to decide at this time, a genuine issue of material fact exists, among other things, as to the intentions of the parties regarding paragraph 9B. Accordingly, the motion for partial summary judgment filed by Global is DENIED.

Opelousas, Louisiana, March 31, 1989.

John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

MASTER SERVICE CONTRACT

THIS AGREEMENT, made and entered into this 4th day of March, 1988 by and between:

Global Divers and Contractors, Inc.
(hereinafter called "COMPANY")

and

LEEVAC SHIPYARD, INC.
(hereinafter called "CONTRACTOR")

WITNESSETH: THAT,

WHEREAS, COMPANY in the course of its operations desires to purchase goods or services from CONTRACTOR and

WHEREAS, CONTRACTOR, represents that it has adequate equipment in good working order and fully trained personnel capable of efficiently operating such equipment and performing services for COMPANY

NOW, THEREFORE, in consideration of the mutual promises and agreements herein contained, the parties hereto mutually agree as follows:

1. This Contract shall, until canceled by either party, control and govern all work performed by CONTRACTOR for COMPANY under any subsequent oral and/or written work order(s). Cancellation may be effected by either party by giving the other party ten (10) days prior notice. If CONTRACTOR gives notice of termination, it shall not be effective until such time as CONTRACTOR has satisfactorily completed all work in progress.

The liabilities, obligations and provisions set forth herein shall also be effective between the parties and shall govern and control as between the parties hereto, the performance of all work performed by CONTRACTOR for any company for whom COMPANY is simultaneously working where CONTRACTOR performs such work for such company at or on the same vessel, work site, work location, fixed platform or other location as COMPANY is operating and/or performing services for such company.

2. This Contract does not obligate COMPANY to order work and/or equipment or materials from CONTRACTOR, nor does it obligate CONTRACTOR to accept such order, but it, together with any applicable work order, shall control and govern all work accepted by CONTRACTOR and shall define the rights and obligations of COMPANY and CONTRACTOR during the term hereof.

3. Upon COMPANY notifying CONTRACTOR of the services and/or equipment desired, CONTRACTOR will, upon agreeing to provide same, commence furnishing the same at the agreed upon time and continue such operations diligently and without delay in a good workmanlike manner and in strict conformity with the specifications and requirements contained herein and such work order.

4. CONTRACTOR agrees to comply with all laws, rules and regulations, federal, state and local, which are now or may become applicable to operations covered by this Contract and any work order issued in connection herewith. If any of the terms hereof are in conflict with any applicable rule, regulation, order or law of a state or federal regulatory body, the terms of this Contract so in conflict shall not apply and the applicable state or federal rule, regulation, order or law shall prevail.

5. Neither COMPANY nor CONTRACTOR shall be liable to the other for any delays or damages due, occasioned or caused by reason of federal or state laws or the rules, regulations or orders of any outside body or official purporting to exercise authority or control respecting the operations covered hereby, including the use of tools and equipment, or due, occasioned or caused by strikes, action of the elements, or causes beyond the control of the parties affected hereby, and any delay due to the above causes, or any of them, shall not itself be deemed to be a breach of or failure to perform under this Contract.

6. COMPANY shall pay CONTRACTOR for the work and/or equipment or materials furnished by CONTRACTOR at the rate stipulated in the work orders provided for herein, subject to the same being accepted by COMPANY as fully complying with all the terms, conditions, specifications and requirements of this Contract and such work orders; provided, CONTRACTOR shall have satisfied COMPANY that there are no liens or claims on or against COMPANY or its property by reason of the operations of CONTRACTOR hereunder.

7. Delivery tickets covering any materials or supplies furnished by vendors for which COMPANY is obligated to reimburse CONTRACTOR, shall be turned in to COMPANY as received. The quantity, description and condition of materials and supplies so furnished shall be verified and checked by CONTRACTOR, and such delivery tickets shall be properly certified as to receipt by CONTRACTOR'S representative.

8. A. The CONTRACTOR will procure at its own cost and expense, including the cost of all deductibles, and continuously maintain in force, insurance in accordance with COMPANY'S Minimum insurance Requirements, and this Article 8. The CONTRACTOR will, at the commencement of this agreement, furnish COMPANY a certificate

evidencing all policies and endorsements required to be obtained by CONTRACTOR under this Article 8 and the Minimum Insurance Requirements provision and if requested by COMPANY, to furnish certified copies of all such insurance policies. CONTRACTOR further agrees that should CONTRACTOR fail to comply with any or all of the terms of Article 8. CONTRACTOR will be liable to COMPANY as an insurer with the terms of said insurance to be equivalent to the terms of similar policies held by either CONTRACTOR or COMPANY. CONTRACTOR will be liable for all deductible amounts for all policies specified herein.

B. Each insurance policy, except that of worker's compensation, required hereunder shall be endorsed to name COMPANY and such other parties as may be designated by COMPANY from time to time as additional insured with no obligation to pay premiums or deductibles. Said policies shall be primary under any insurances that may be maintained by COMPANY. No "other insurance" provision shall be applicable to COMPANY, its affiliated and subsidiary companies or their underwriters by virtue of having been named an additional assured under this policy.

C. Each insurance policy required hereunder shall provide for waivers of subrogation in favor of COMPANY and COMPANY, its affiliated and subsidiary companies, or any employee, agent or CONTRACTOR of COMPANY and against any person, firm or corporation for whom COMPANY may be acting.

D. The types of insurance and limits of liability specified under the Minimum Insurance Requirements provisions of this agreement shall not be deemed to constitute a limitation of CONTRACTOR'S liability for claims, undertakings or indemnities hereunder.

E. Minimum Insurance Requirements:

All such insurance shall be carried in a company or companies acceptable to COMPANY and shall be maintained in full force and effect during the term of any work performed under the terms of this Contract and work orders, invoices or statements issued pursuant hereto, and such insurance shall not be cancelled, altered or amended without thirty (30) days prior written notice having been furnished to COMPANY.

(1) Worker's Compensation Insurance covering all of the agents, servants and employees of CONTRACTOR for all compensation and other benefits required by applicable State and Federal law or by governmental authority on account of injury, death, sickness or disease. Such insurance must include coverage for claims under the United States Longshoremen's and Harbor Workers' Act and be extended to cover operations on the Outer Continental Shelf.

(2) Employer's Liability Insurance, with the "watercraft exclusion" deleted, in the minimum limits of One Million Dollars ($1,000,000) per accident covering injury or death to any employee which may be outside the scope of the Workers' Compensation statute of the state in which the work is performed;

(3) Maritime Employer's Liability Insurance with a limit of One Million Dollars for each person covering claims by the agents, servants or employees of CONTRACTOR with respect to employer's liability, whether the claim arises under statute, such as the Jones Act, under maritime law, or otherwise.

(4) Comprehensive General Liability Insurance, with the "watercraft exclusion" deleted, with minimum limits of One Million Dollars ($1,000,000) for any one accident and One Million Dollars

($1,000,000) for property damage, and shall include coverage for the services to be performed and for the obligations and liabilities assumed and undertaken by CONTRACTOR under this Agreement.

(5) Automobile Liability Insurance covering owned, non-owned and hired automotive equipment with minimum limits of One Million Dollars ($1,000,000) for injury to or death of any one person, and One Million Dollars ($1,000,000) combined single limit bodily injury and property damage;

(6) Full form Protection and Indemnity insurance on all vessels and floating equipment owned, chartered, operated, managed or otherwise used, possessed or controlled by CONTRACTOR. Such Protection and Indemnity insurance shall be in an amount equal to the value of any vessels, but not less than One Million Dollars ($1,000,000), used by CONTRACTOR to perform services pursuant to this Contract, and shall include liability for injury or death of master and members of the crew, employees of Owner, passengers and third parties.

(7) Hull and Machinery insurance, in an amount equal to the full value of each on vessel and item of floating equipment owned, chartered, operated, managed, or otherwise used, possessed or controlled by CONTRACTOR to perform services pursuant to this Contract. If Vessel is to be engaged in the towage of other vessels, Tower's Liability Insurance shall be provided in an amount equal to the actual value of the Vessel but not less than One Million Dollars.

9. A. CONTRACTOR agrees to release, protect, indemnify, defend and hold COMPANY harmless from and

against all liability, claims, demands and causes of action of every kind and character, including the cost of the defense thereof, for loss of or damage to property of the CONTRACTOR and its invitees, howsoever caused and even though caused by the negligence of the indemnified party, its invitees or anyone for whom they may be acting.

B. COMPANY agrees to release, protect, indemnify, defend and hold CONTRACTOR harmless from and against all liability, claims, demands and causes of action of every kind and character, including cost of the defense thereof, for loss of or damage to property of the COMPANY and its invitees, howsoever caused and even though caused by the negligence of the indemnified party, its invitees or anyone for whom they may be acting.

10. A. CONTRACTOR agrees to fully protect, indemnify, defend (including attorneys' fees and investigations, and hold harmless COMPANY, its officers, directors, agents, servants and employees, and (hereinafter, Indemnitees(s) from and against any and all claims, losses, demands or suits and all liabilities of every kind and character brought by or on behalf of CONTRACTOR and its employees, agents and subcontractors, which may in any manner arise from, or be incidental to, directly or indirectly, failure or defect in CONTRACTOR'S products or services, performance of the work or preparations therefor (including transportation of personnel or material to or from any job site, performance of this Agreement, or breach hereof) and even though such claims, losses, demands or suits may have been caused or contributed to by the joint or concurrent negligence of third parties, COMPANY or other indemnitee(s).

B. COMPANY agrees to fully protect, indemnify, defend (including attorneys' fees and investigations) and hold harmless CONTRACTOR, its officers, directors, agents, servants and employees, (hereinafter, Indemnitee(s)

from and against any and all claims, losses, demands or suits and all liabilities of every kind and character brought by or on behalf of COMPANY and its employees, agents and subcontractors or any Indemnitee which may in any manner arise from, or be incidental to, directly or indirectly, failure or defect in COMPANY'S products or services, performance of the work or preparations therefor (including transportation of personnel or material to or from any job site, performance of this Agreement, or breach hereof) and even though such claims, losses, demands or suits may have been caused or contributed to by the joint or concurrent negligence of third parties, CONTRACTOR or other Indemnitee(s).

11. CONTRACTOR shall report to COMPANY as soon as practicable all accidents or occurrences resulting in injuries to CONTRACTOR'S employees or third parties, or damages to property of third parties, arising out of or during the course of services for COMPANY by CONTRACTOR or any subcontractor of CONTRACTOR, and, when requested, shall furnish COMPANY with a copy of reports made by CONTRACTOR to CONTRACTOR'S insurer or to others of such accidents and occurrences.

12. CONTRACTOR agrees to pay all licenses and fees levied or assessed on CONTRACTOR in connection with or incident to the performance of work orders issued pursuant to this contract by any governmental agency and unemployment compensation insurance, old age benefits, social security or any other taxes upon the wages Contractor, its agents, employees and representatives.

13. In the event CONTRACTOR or its subcontractors use any equipment, machinery, tools or other items belonging to or furnished by COMPANY, CONTRACTOR shall examine the same or cause the same to examined prior to such use. CONTRACTOR shall immediately notify COMPANY of any defects which are

found in such equipment, machinery, tools or other items furnished by or on behalf of COMPANY wherein such defects would render such items unsuitable or unsafe for the operations to be commenced. Should CONTRACTOR fail to make such an examination or fail to report a defect in such item or items, CONTRACTOR shall be deemed to have assumed all risk and liability for any mishap which may occur in operations conducted hereunder by any reason of failure or defects in such equipment, machinery, tools or other items.

14. A. CONTRACTOR warrants that all work or services provided hereunder shall be performed in a good and workmanlike manner, in strict accordance with any plans or specifications furnished, using skilled, competent and experienced workmen and supervisors. Any portion of the work found defective or unsuitable in the judgment of Company, shall be removed, replaced or corrected by Contractor without additional cost or risk to Company.

B. CONTRACTOR warrants that all goods. products, materials, equipment, supplies or manufactured articles furnished by Contractor in the performance of work or services entering into or necessary to the construction or completion of the work or services shall be of the best quality for their respective purposes shall be complete, operational and free from defect.

C. CONTRACTOR shall be an independent contractor with respect to the performance of all work hereunder, and neither CONTRACTOR nor anyone employed by CONTRACTOR shall be deemed for any purpose to be an employee, agent, servant or representative of COMPANY in the performance of any work or services or party thereof in any manner dealt with hereunder. COMPANY shall have no direction or control of the CONTRACTOR or its employees and agents Company being interested only in the results to be obtained. The

work contemplated herein shall meet the approval of COMPANY and he subject to the general right of inspection for COMPANY to secure the satisfactory completion thereof. The actual performance and superintendence of all work hereunder shall be by CONTRACTOR, but COMPANY or its representatives shall have unlimited access to the operations to determine whether the work is being performed by CONTRACTOR in accordance with all provisions of this Contract and the work order.

15. In addition to all other indemnifying provisions contained herein, CONTRACTOR represents and warrants that the use or construction of any and all tools and equipment furnished by CONTRACTOR and used in the work provided for herein does not infringe on any license or patent which has been issued or applied for, and CONTRACTOR agrees to indemnify and hold COMPANY harmless from any and all claims, demands, and causes of action of every kind and character in favor of or made by any patentee, licensee or claimant of any right or priority to such tool or equipment, or the use or construction thereof, which may result from or arise out of furnishing or use of any such tool or equipment by CONTRACTOR in connection with the work under this Contract and applicable work orders.

16. In addition to all other indemnifying provisions contained herein, CONTRACTOR agrees that it will require all subcontractors engaged by it to provide insurance and indemnity agreements affording COMPANY the same protection as provided in the insurance and indemnity agreements contained in this Contract.

17. In the event there is a conflict between the provisions hereof and any papers or documents which may have been executed or passed between the parties hereto in connection with the subject matter hereof, it is understood

and agreed that the provisions hereof shall be controlling except as specifically superceeded by any work order. It is expressly understood and agreed by the parties hereto that no provision of any delivery ticket, invoice or other instrument used by CONTRACTOR in setting forth the operations conducted hereunder shall supersede the provisions of this Contract.

18. Time is expressly declared to be the essence in this Contract. If either party hereto defaults in the performance of this Contract, or work commenced under work orders as provided for herein, the party has the option to terminate this Contract and the work order involved, such termination shall be without prejudice to any other rights which the terminating party may have.

19. No waiver by either party hereto of any of the terms, provisions or conditions hereof shall be effective unless said waiver shall be in writing and signed by an authorized representative of such party.

20. This paragraph intentionally left blank.

21. A. The term "invitees" as used herein shall mean the agents, Subcontractors employees, employees of agents and/or subcontractors of, and invitees of a party hereto. Employee status shall be determined solely by payroll listings without regard to allegations of or judicial findings of "borrowed servant" status or similar legal theories.

B. The term "property" as used herein shall mean all property (real or personal), equipment, material or supplies belonging to or leased by a party or its invitees.

C. Except for Article 10 hereof, the term "negligence" as used herein shall mean the sole, joint and/or concurrent negligence of a party and shall also, include any

preexisting conditions, as well as any theory of recovery based on strict liability, including, but no limited to, unseaworthiness of a vessel, product liability, merchantability or any other legal right or recovery.

D. The term "COMPANY" as used herein shall mean the company and/or companies named in the first paragraph of this Contract and all affiliated, subsidiary and/or interrelated companies.

E. The term "CONTRACTOR" as used herein shall mean the company named in the first paragraph of this Contract and all affiliated, subsidiary and/or interrelated companies.

22. Any provisions of this agreement or of any part hereof which is void, prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective only to the extent of such voidance, prohibition or unenforceability without invalidating the remaining provisions hereof, or affecting the validity or enforceability of such provision in any other jurisdiction or the validity or enforceability of this agreement as a whole.

23. In connection with performance under this agreement, Contractor will not discriminate against any employee or agent for employment because of race, creed, color, sex, age, national origin, religion or physical or mental handicap whether with respect to employment, promotion, demotion, termination or layoff, remuneration or otherwise. Contractor shall be bound by and comply with applicable provisions of statutes, ordinances, executive orders or other laws, rules, regulations or orders of any Federal, State, local or other duly constituted authority relating in any way to nondiscrimination or nonsegregation, including but not limited to compliance to the extent required with provisions of Executive Orders 11246, 11458, 11701 and the Vocational Rehabilitation Act of 1973.

24. All notices to be given with respect to this Contract and the applicable work orders shall be given to COMPANY and to the CONTRACTOR, respectively, at the addresses herein below show. All sums payable hereunder to contract or shall be payable at the address herein below shown unless otherwise specified herein or in the applicable work order.

CONTRACTOR(S) Leevac Shipyards, Inc.
P.O. Box 1190
Jennings, Louisiana 70546

COMPANY(S) Global Divers and Contractors, Inc.
P.O. Box 10840
New Iberia, Louisiana 70560

IN WITNESS WHEREOF, the parties hereto have executed this Contract upon the date above show in several counterparts, each of which shall be considered as an original.

CONTRACTOR(S)

LEEVAC SHIPYARDS, INC.

Witness: M.E. Hill By: Charles Burrell

COMPANY(S)

GLOBAL DIVERS & CONTRACTORS, INC.

Witness: M.E. Hill By: Peter J. Borne
Peter J. Borne
Secretary-Treasurer

STATE OF LOUISIANA

PARISH OF IBERIA

WORK ORDER
FOR CONVERSION OF VESSEL
MV WESTERN NARROWS
OFFICIAL NUMBER 618316

This agreement made and entered into this 4th day of March, 1988, by and between:

GLOBAL DIVERS AND CONTRACTORS, INC., a Louisiana corporation domiciled in the Parish of Iberia whose mailing address is P.O. Box 10840, New Iberia, Louisiana 70562-0840, represented herein by its duly authorized officer,
(hereinafter referred to as Company)

and

LEEVAC SHIPYARDS, INC. a Louisiana corporation domiciled in the Parish of St. Mary whose mailing address is P.O. Box 1190, Jennings, Louisiana, represented herein by its duly authorized officer,
(hereinafter referred to as Contractor).

W I T N E S S E T H

For the considerations, covenants and undertakings hereinafter expressed, the parties do hereby agree as follows:

1.

Global Divers & Contractors, Inc. and LEEVAC Shipyards, Inc. are parties to that certain agreement dated March 4, 1988, entitled Master Service Contract, and the parties agree that this Work Order is issued and accepted pursuant to and subject to all terms and conditions of said Master Service Contract.

2.

MV Western Narrows is Vessel herein referred to and bears the official number 618316 but may be referred to herein or in plans and specifications as MV Global 1000.

3.

Contractor hereby covenants and agrees with Company to furnish all labor and materials for the repairs to and conversion of Vessel, in accordance with the conditions hereinafter set forth and in a good and workmanlike manner in strict accordance with plans and specifications furnished by Company and to deliver Vessel to Company, free and clear from all claims or liens at CONTRACTOR's dock on the Mermentau River.

4.

Work to be performed under this contract shall be commenced promptly after delivery of the vessel to contractor's dock and diligently and expediently pursued thereafter until, and completed in accordance with plans and specifications including final clean up of the vessel. The parties agree that time is of the essence in this agreement.

5.

Contractor hereby agrees to perform all work, furnish all labor, tools, materials, appliances, scaffolding and delivery of every description necessary to do and perform all work required pursuant to this agreement, including all contract documents annexed hereto and made part hereof and deliver the same for payment as follows:

1. All work to be done on a time and material basis. Hourly rate at $21.00 per hour for a 9 hour work day Monday thru Friday. Overtime rate is $27.00 per hour after 9 work hours per day and weekends. A small second shift is available at the same rate. Material at cost (including freight) plus 10%. No overtime shall be charged unless specifically authorized in writing in advance by Global.

2. Based on Vessel arriving at LEEVAC Shipyard on 7 March 1988, the dry dock should be available during the second or third week of March.

3. Shorepower at $20.00 per day plus hookup and unhook charge (about 8 hours).

4. Dry docking at $1200.00 which includes initial setting of blocks. Shifting of blocks, if required, based on man-hours required. No lay day charge for dry dock as long as LEEVAC is doing work on the Vessel while on dock.

5. Ship repairers legal liability insurance charged at 1.25% of total invoiced amount of job.

6. Consumable items are items that are not necessarily a part of the delivered Vessel but are necessary to make the repairs or conversion. These are normally items that are requisitioned by shipyard workers from the LEEVAC warehouse to perform their jobs. Included as consumables are tape, outfitting tips, light bulbs, grinding discs, welding and cutting lens, flashlight batteries, plastic vent tubing, visqueen, paint brushes, dust masks, rollers, blasting hood lens, welding blankets, rubber gloves, rain coats (when applying Compound H), etc. subject to approval of Company's shipyard representative. These are charged as material costs.

7. Consumable items also included as material costs are blasting sand, paint thinner, welding rods and oxygen.

8. Payment Schedule:

   Down Payment - at time of committing to bring Vessel to LEEVAC Shipyard - $25,000 to purchase initial steel order. LEEVAC will provide proof of purchase prior to presenting any additional invoices.

   Interim Payments - Every 2 weeks after arrival of Vessel, LEEVAC will present invoices for payment if labor and material costs not previously invoiced. Payment due to LEEVAC within 7 days of receipt of invoice.

9. Global Divers responsible for all sales taxes, if any.

10. Company representative will be given copies of time sheets, material requisitions, consumables and direct material costs on a daily basis to approve costs expended from previous day.

6.

6.1 All work herein specified, or otherwise required pursuant to law or applicable U.S. Coast Guard and American Bureau of Shipping Standards and regulations, shall be done in the best marine manner and to the true meaning and intent of the plans and specifications.

6.2 Contractor shall perform no additional work of any kind which is not specified in the plans and specifications unless a separate estimate in writing for same before its commencement shall have been submitted by Contractor and the consent of the Company obtained in writing.

7.

7.1 WARRANTY: Contractor warrants that all work will be done in a first class workmanlike manner, and that all labor and installations made shall meet the requirements and standards in the specifications, and all materials intended for use and equipment used by Builder shall be of the quality set forth in the specifications. All component parts of the Vessel except those specified or furnished by the Company, shall conform to the standards of first class material for commercial ships of this class.

7.2. EQUIPMENT PURCHASED: Contractor does not warrant any equipment purchased by it for installation on the Vessel is free from manufacturer's defects, and specifically disclaims any warranties expressed or implied, with respect to such equipment, but does hereby

extend the manufacturer's warranty or guarantee, if any, to the Company. Contractor will use its best efforts and will cooperate with the Company in order to enforce any claims for any manufacturer's defects that may occur.

7.3. Contractor's warranty shall extend only to those defects which are reported in writing to the Warranty Department of Contractor within six (6) months of re-delivery of the Vessel. In the event that the Company notifies Contractor of any defect covered under this Warranty, Contractor will make repairs and/or replacement, at its option, at the Contractor's yard without expense to Contractor for transporting the Vessel or any component thereof to and from the yard; provided that if it is not practical to have the Vessel return to the yard, Company may, with the prior written consent of the Contractor, have such repairs and/or replacements made elsewhere and in such event, Contractor shall pay the Company a sum equivalent to the price the Contractor would charge for removing such a defect at its yard, or failing agreement in this regard, as is determined by arbitration hereunder, limited to one hundred twenty percent (120%) of the average cost to effect such repairs and/or replacement in repair yards in the Gulf Coast Area of the United States of America. Builder shall not unreasonably withhold its consent to the making of repairs and replacements at other yards.

7.4. The sole and exclusive remedy of the Company for any such claim shall be the obligation of Contractor, under and pursuant to this section, to repair and/or replace, or cause to be repaired and/or replaced, any such defective workmanship or installation of materials and equipment provided such defects or breakdowns have not been caused by the negligent operation or maintenance of the Vessel or the Vessel's equipment, after delivery, by those in charge of the Vessel's operations, or other parties not in the employ of the Contractor. For breach of the warranty contained in

this Section, Contractor shall not be responsible for any sum in excess of the cost of the repairs or replacement as specified herein, it being specifically understood the Contractor is not responsible for delay, demurrage, loss of profits, loss of use or any other consequential damages. Contractor does not warrant any painting done unless it can be shown that the manufacturer's instructions were not followed during applications.

8.

The Global Project Coordinator for this project is M.E. Hill and the Project Manager for this project is Larry Bergman. M.E. Hill or Larry Bergman shall at any time give notice that they are assigning new persons to act as Coordinator on behalf of Global. Their responsibilities shall include coordination of the activities of all parties engaged in the performance of work and/or furnishing of materials for the job site. Project Coordinator shall have the authority to establish schedules for the delivery of materials, performance of work, inspect, accept or reject workmanship or materials, approve payment therefor and to require such invoices, waivers of lien and other documentation as Project Coordinator may deem necessary.

INSPECTION BY COMPANY'S REPRESENTATIVE. Contractor will furnish and equip reasonable office space at its yard for the duly authorized representative(s) of the Company who shall have reasonable access to the work of the Contractor. Company's representative(s) shall promptly inspect and accept all workmanship and material which is in conformance with this Agreement.

9.

If, during the progress of the work to be performed hereunder, Contractor should become bankrupt, insolvent, fail or refuse to pay laborers or suppliers of material, refuse

or neglect to supply a sufficiency of material or of workmen or fail to or refuse to follow the plans and specifications or to comply with any part of this contract, then Company at its option, shall have the right and power to enter upon the Contractors premises and take possession of the Vessel and may immediately terminate this contract, whereupon all claims of Contractor hereunder shall cease and Company may provide materials and workmen sufficient to complete the said work after giving forty-eight (48) hours notice in writing to Contractor at the address set forth hereinabove. The expense of notice, cost of completing the various works, together with all fees, charges, including attorneys' fees, incident to the completion or enforcement of this contract, shall be a charge and lien against Contractor and may be deducted from the amount due or to become due to him. Company shall not be liable or accountable to Contractor in any way for the manner in which the work was completed pursuant to this paragraph, nor shall the exercise of any rights herein be construed as a substitute of or a waiver of any of the legal rights of Company against Contractor, arising out of this contract.

10.

10.1. Contractor shall comply with the applicable provisions of Federal, State and local safety laws, codes and other governmental and/or municipal regulations and shall take all necessary precautions for the safety of employees, visitors and all persons on or adjacent to the job site. Contractor shall provide, erect and maintain proper warning signals, lights, signs, barricades and all other necessary safety precaution, on and along the work, as are required by the conditions and the progress of the work for the protection of the work, workmen and the public.

10.2. Contractor shall purchase and maintain with solvent insurers adequate policies of liability insurance which shall provide that Company shall be given at least ten

(10) days notice in writing prior to cancellation. Said policy shall be endorsed to waive subrogation against Company and shall name Company as additional insured.

10.3. Contractor shall be responsible for payments of all taxes and contributions due or payable to his employees, agents and/or subcontractors, under the Federal Security Act and applicable state laws.

11.

The provisions of this agreement are severable such that if any term or provision hereof is deemed to be invalid or unenforceable the remainder of this agreement shall not be affected thereby.

12.

ARBITRATION: In the event a dispute arises hereunder between the parties, such dispute shall be submitted to ABS Worldwide Technical Services (ABSTECH) in New Orleans, Louisiana and request an opinion. Both parties will be bound by the decision of the ABSTECH representative provided both parties agree on the specific individual designated by ABSTECH. The Arbitrator shall determine which party or the proper proportion which each party shall assume of the expenses or arbitration, and the arbitration by the party or parties to which such expenses are directed to be paid.

13.

APPLICABLE LAW: This Agreement shall be governed by the laws of the State of Louisiana.

14.

PATENTS: Company shall defend Contractor and hold it harmless from claims of infringement of any patent rights on account of designs, parts or equipment for the vessel furnished by the Company.

Contractor shall defend Company and hold it harmless from claims of infringement of any patent rights arising from the use in the Vessel of designs, parts or equipment supplied by Contractor.

In witness whereof the parties have executed this work order, at New Iberia, Louisiana,
on the date and date first above written.

WITNESSES: COMPANY:

GLOBAL DIVERS AND
_____ CONTRACTORS, INC.

_____ BY: Peter J. Borne

CONTRACTOR:

_____ LEEVAC SHIPYARDS, INC.

_____ BY: Charles Burrell

Leevac Shipyard, Inc. received check No. 9132 from GLOBAL DIVERS AND CONTRACTORS, INC. in the amount of Twenty-Five Thousand and No/100 Dollars ($25,000.00) as down payment on boat alterations on the M/V Western Narrows (Global 1000).

LEEVAC SHIPYARD, INC.

Charles Burrell
Charles Burrell

March 4, 1988
Date

GLOBAL DIVERS AND CONTRACTORS, INC.
AND THE SCANAV CORPORATION

NOTICE TO CONTRACTORS, AGENTS AND INSURANCE COMPANIES:

Please Complete and Return this Form to:

CERTIFICATE OF INSURANCE

This is to certify that the following insurance policies, issued by the following insurance company or companies are in full force and effect. Said insurance company(ies) agree(s) that in the event any changes are made in the policies which affect the interest of Corporation and/or subsidiary and/or affiliated companies, or in the event said policies are canceled or materially changed written notice will be given to thirty (30) days prior to the effective date thereof.

Name of Insured: CARI CORP., LEEVAC ETAL
Address: P.O. Box 2607, Morgan City, LA 70381
Description of Insured Operations: Conversion 185' supply vessel M/V Western NARROWS to Diving Vessel

INSURANCE POLICIES IN FORCE

A. WORKMEN'S COMPENSATION — Statutory
EMPLOYER'S LIABILITY — $500,000 Each Employee / $500,000 Each Accident

CARRIER: Hartford Accident & Indemnity
Policy Term: 4/1/87 - 4/1/88
ADDRESS: P.O. Box 61267 New Orleans, LA 70161 Policy No.: 43WZVV3562

B. COMPREHENSIVE GENERAL LIABILITY:

Bodily Injury — $500,000 Each Person / $500,000 Each Accident
Property Damage — $500,000 Each Accident

CARRIER: Boston Old Colony Insurance Co.
Policy Term: 4/1/87 - 4/1/88
ADDRESS: P.O. Box 8870 Policy No. L2-98-86-86

Metairie, LA 70011

C. COMPREHENSIVE AUTOMOBILE LIABILITY:

Bodily Injury Combined Single Limit 1,000,000 Each Person
$____ Each Accident
Property Damage $____ Each Accident

CARRIER: Liberty Mutual Insurance Co.
Policy Term: 4/1/87 - 4/1/88
ADDRESS: P.O. Box 9011 Policy No. ASI-391-064920-017
Tyler, TX 75711-9011

D. PROTECTION & INDEMNITY: Form of Coverage

American Institute Builder's _____ Each Person

Vessel: WESTERN NARROWS (Attach List) Risk Clauses 2/79 $____ Each Accident
Policy Term 1/1/88-1/1/89 $1,000,000 Minimum P&I
Policy No. HB740082 As Declared to $7,500,000 any one vessel.

CARRIER: Boston Old Colony Ins. Co. (MOAC)

ADDRESS: P.O. Box 8870, Metairie, LA 70011

Builder's Risk

E. HULL & MACHINERY - Vessel(s): WESTERN NARROWS (Attach List)

CARRIER: Boston Old Colony Ins. Co. MOAC
Policy Term: 1/1/88-1/1/89 $_____ Each Person

ADDRESS: P.O. Box 8870 Policy No. HB740082 $____ Each Accident

Metairie, LA 70011. As declared to $7,500,000 any one vessel.

F. EXCESS LIABILITY: Form of Coverage ____ $10,000,000

CARRIER: Lloyds of London & Institute COS.
Policy Term: 4/1/87-4/1/88
ADDRESS: 824 Gravier Street Policy No. GCM 12793
New Orleans, LA 70112

G. AIRCRAFT LIABILITY: Form of Coverage _____
$_____ Each Person

CARRIER: _____ Policy Term: _____
ADDRESS: _____ Policy No. _____

H. SHIPREPAIRER'S LEGAL LIABILITY Policy Term: 1/1/88-89 Policy No. HB740084 $1,000,000

Carrier: Boston Old Colony Ins. Co., P.O. Box 8870, Metairie, LA 70011 Combined Single Limit

PLEASE ANSWER THE FOLLOWING QUESTIONS REGARDING THE FOREGOING POLICIES. EACH QUESTION MUST BE ANSWERED.

A. Worker's Compensation and Employer's Liability:

1. Does this policy contain:
   (a) U.S. Longshoremen's and Harbor Workers Compensation Endorsement? (x) yes ( ) no
   (b) Outer Continental Shelf Act Endorsement? (x) yes ( )no
   (c) Voluntary compensation Endorsement, including Maritime Operations? (x) yes ( ) No
   (d) Is coverage afforded for transportation, wages, maintenance and cure? (x) yes ( ) no
   Covered separately under P&I policy
   Limits of Liability – Coverage B$_____ Each Person
   $_____ Each Occurrence
   (e) Provision that a claim "in rem" shall be treated as a claim against the insured? (x) yes ( ) no
2. It is hereby certified that this policy is filed with the proper authorities in the state(s) of: Louisiana
3. Has filing been made with U.S. Deputy Commissioner? (X) yes ( ) No

B. Comprehensive General Liability:

1. If insured has contract with or subsidiaries containing "hold harmless" agreement: does policy cover such assumed liability? (X) yes ( ) no
2. Does Policy cover:
   (a) Contractual liability? (X) yes ( ) no
   (b) Property damage resulting from blasting and explosion, collapse and underground damage? (X) yes ( ) no
   (c) Water craft owned and/or _____ by the insured away from insured premises? (X) yes ( ) no
3. ??
4. Territory covered Continental U.S.:
   (a) Does policy cover waters offshore of the USA? (X) yes ( ) no
   (b) If answer to (a) is "yes", up to how many miles offshore? Unspecified
5. Are products/completed operations covered?(X) yes ( )no

Automobile Liability: 1. Does this policy cover:

(a) All owned automobiles? (X) yes ( ) no
(b) Non-owned automobiles? (X) yes ( ) no
(c) Hired automobiles? (X) yes ( ) no

Protection and Indemnity including Wreck & Debris Removal:

1. What deductible applies? $15,000.00 Maximum
2. What are navigation limits? Trial trips up to 300 miles or held covered.

Hull and Machinery:

1. What deductible applies? $15,000.00 Maximum
2. What are navigation limits? Trial trips up to 300 miles or held covered.
3. If vessel is used as a drilling barge or drilling tender, does policy cover:
   (a) Drilling equipment and supplies on board?(X) yes ( ) no
   (b) Damage resulting from blowout and cratering? (X) yes ( ) no

Excess Liability:

1. Does the policy provide coverages in excess of the limits provided in B,C,D,E and G? (X) yes ( ) no

Aircraft Liability: Except Statutory Compensation

1. Does policy include extension of territorial limits to include the Gulf of Mexico? (X) yes ( ) no

It is hereby certified that Contractors' policies described in this certificate have been endorsed to waive any and all rights of subrogation, whether created by law, equity, or contract, against its affiliated and subsidiary companies, or any officer, director, employee agent, invitee or contractor or subcontractor of or against any person, firm or corporation for whom may be acting. (X) yes ( ) no

It is hereby certified that the insurance policies have been endorsed to name , its affiliated and subsidiary companies as additional assureds with no obligation to pay premiums, deductibles or liability for expenditures under any claim.

Except Workers Compensation (X) yes ( ) no

It is hereby certified that the insurance policies provide that whenever any of the properties and/or liabilities at the time of loss is covered by these insurances whether or not coverage is effected by other insurance, prior, simultaneous or subsequent in date to this policy and by whomsoever effected, this policy shall be considered primary, and in case of any loss, the limits stipulated herein shall be exhausted prior to any other insurances' participation.

(X) yes ( ) no

This certificate is to used to list such coverages as the policies listed thereon provide, and does not reflect our insurance requirements.

B. COMPREHENSIVE GENERAL *LIABILITY* Boston Old Colony Ins. Co. BY: signed
(Insurance Company) (Authorized Representative)

Date 2/26/88 Place New Orleans, LA

C. AUTOMOBILE COVERAGE Liberty Mutual Insurance Co. BY: signed
(Insurance Company) (Authorized Representative)

Date 2/26/88 Place New Orleans, LA

D. PROTECTION & INDEMNITY Boston Old Colony Ins. Co. BY: signed
(Insurance Company) (Authorized Representative)

Date 2/26/88 Place New Orleans, LA

E. HULL & MACHINERY Boston Old Colony Ins. Co. BY: signed
(Insurance Company) (Authorized Representative)

Date 2/26/88 Place New Orleans, LA

F. EXCESS LIABILITY Lloyds of London & Institute Cos. BY: signed
(Insurance Company) (Authorized Representative)

Date 2/26/88 Place New Orleans, LA

G. AIRCRAFT OR OTHER

_____ BY: _____
(Insurance Company) (Authorized Representative)

Date _____ Place _____

Producing Agent: Laurance Eustis Insurance Agency, Inc.
Address: 345 Baronne Street, New Orleans, LA 70112
Telephone No. 504-586-044

KUTNER BUICK, INC.

v.

AMERICAN MOTORS CORPORATION
and American Motors Sales Corp.
Civ. A. No. 85-2400.
United States District Court, E.D.
Pennsylvania.
October 2, 1986

David Berger, H. Laddie Montague, Jr., Philadelphia, PA, for plaintiff.

William J. Lehane, Philadelphia, PA., for American Motors Corp. and American Motors Sales Corp.

MEMORANDUM

SCIRICA, District Judge.

*1 Nearly 160 years ago, the Pennsylvania Supreme Court observed that few decisions are more perplexing than whether parol evidence of parties' intent is admissible to interpret a written agreement. See Thompson v. M'Clenachan, 17 Serv. & Rawle 110, 113 (Pa. 1827). The cross-motions for summary judgment before me today prove that this task has become no easier with the passage of time.

Plaintiff, Kutner Buick, filed suit in April, 1985, charging defendants, American Motors Sales Corp. ("AMC Sales") and American Motors Corp. ("AMC") with breaching an automobile franchise agreement by appointing a new dealer in Northeast Philadelphia (Count I. [FN1] Defendants move for summary judgment, arguing that a fully integrated written agreement granted plaintiff a

nonexclusive dealership territory. As a result, defendants argue, extrinsic evidence of prior oral agreements or negotiations is inadmissible to show the existence of a material issue of disputed fact concerning the exclusivity provision of the written contract. Thus, plaintiff maintains, not only is parol evidence admissible, but it supports a grant of summary judgment in its favor. Plaintiff further argues that certain contract terms are ambiguous, thereby rendering parole evidence admissible to interpret those terms.

In reviewing a motion for summary judgment, I must determine whether a material issue of disputed fact exists by viewing the facts and inferences drawn from the facts in the light most favorable to the nonmoving party. Fed.R.Civ.P. 56; Pollock v. American Tel. & Tel., 794 F. 2d 860, 864 (3d Cir. 1986); Gans v. Mundy, 762 F.2d 338, 340 (ed Cir.), cert. denied, 106 S. Ct. 537 (1985). I must further determine whether the moving party is entitled to judgment as a matter of law. Fed.R. Civ.P. 56; Pollock, supra, at 764; Gans, supra, at 340. Based on these principles and for the reasons stated below, I deny the cross-motions for summary judgment.

This court's jurisdiction is based on 28 U.S.C. s 1332, and the case is governed by Pennsylvania law. In their written contract, the parties stipulated that Pennsylvania law shall govern any disputes concerning their agreement, and neither party has contested the viability of this choice of law clause. I concur. American Air Filter Co., Inc. v. McNichol, 527 F.2d 1297, 1299 n. 4 (3d Cir. 1975); Boase v. Lee Rubber & Tire Corp., 437 F.2d 527 (3d Cir. 1970).

FACTS

In October, 1980, a Kutner Buick official contacted AMC requesting an AMC dealership in Northeast Philadelphia. AMC denied the request, explaining that another dealer

(Matt Slapp) at Grant Avenue and Academy Road already operated an AMC dealership about five miles from Kutner Buick. When Slapp closed his AMC dealership in 1981, Kutner Buick renewed its request for an AMC franchise. Jules Kutner, owner of Kutner Buick, emphasized in the negotiations with William Carroll, an AMC official, that Kutner Buick would not accept the AMC franchise unless it received territory protection ensuring that Kutner was the sole AMC dealer in the Northeast Philadelphia market area. AMC objected to Kutner's request, explaining that it must maintain two dealer points or trade areas in the Northeast Philadelphia market: one known as "Philadelphia-Northeast" and the other known as "Philadelphia-Academy." Further oral negotiations followed in which the parties apparently reached an understanding whereby AMC would maintain two dealership locations in Northeast Philadelphia, but nonetheless, assure Kutner some type of territory protection from competition -- at least during the formative years of Kutner's AMC operation.

*2 This oral colloquy however, is not reflected in the parties' October, 1981 written contract. [FN2] Instead, the writing includes a merger clause and provides that Kutner's franchise shall be nonexclusive and shall cover the Philadelphia-Northeast area. Kutner explained that he signed the agreement, notwithstanding the absence of any territory protection, based on Carroll's assurance that the prior oral agreement of nonexclusivity would control. Carroll and other AMC officials have confirmed the Carroll-Kutner oral agreement, but defendants now attempt to recast the conversation as Carroll's expression of his marketing strategy, not a promise to Kutner.

II. Application of the Parol Evidence Rule.

In construing a contract, my primary purpose is to ascertain the intent of the parties. Mellon Bank, N.A. v. Aetna Business Credit, 619 F.2d 1001, 1009 (3d Cir. 1980);

Robert F. Felte, Inc. v. White, 451 Pa. 137, 143, 302 A.2d 347, 341 (1973); Z & L Lumber Co. of Atlasburg v. Nordquist, ---- Pa. Super. ----, ----, 502 A.2d 697, 700 (1985). In most cases, the strongest and oftentimes most reliable indication of parties' objective intent is the written contractual agreement. Gianni v. Russell & Co., 281 Pa 320, 323, 126 A. 791, 792 (1924) (barring fraud or mistake, writing is best and only evidence of agreement); Mellon Bank, supra, at 1009 (sanctity of written word is paramount in contract interpretation). The rule set forth in Gianni operates on the premise that a written agreement merges all prior negotiations into a final expression of the parties' intent; thereby barring parol evidence that contradicts a writing. Gianni, supra, at 323, 126 A. at 792. See also Farnsworth, Contracts s 7.3, at 451 (1982).

Standing along therefore, the parol evidence rule would bar plaintiff from contradicting the written contract by evidence of a prior or contemporaneous agreement between AMC's Carroll and Kutner. Both parties are sophisticated businessmen who understand the meaning of the agreement. See Beckman v. Vassall-Dillworth Lincoln-Mercury, 321 Pa.Super. 428, 468 A.2d 784, 789 (1983). Moreover, the agreement states in plain language that: (1) Kutner's market area is "Philadelphia-Northeast" (not Philadelphia-Northeast" and "Philadelphia-Academy" as Kutner requested) (defendants' Exhibit "A," P 1); (2) the writing embodies the complete agreement of the parties (defendants' Exhibit "A," P7, franchise provision P 29); and (3) Kutner has a nonexclusive right to sell AMC products (defendants' Exhibit "A," franchise provision P 1). If parol evidence of a contradictory oral agreement is inadmissible, these written provisions clearly support defendants' motion for summary judgment.

The parol evidence rule however, includes its exceptions, see Gianni, supra, at 323, 126 A. at 792, one of which admits parol evidence if a party acknowledges a prior oral

promise. This exception is limited to those cases in which the proponent presents "clear, precise, and convincing evidence" establishing that the party enforcing the contract admitted or acknowledged that the writing does not express the entire agreement between the parties. Scott v. Bryn Mawr Arms, Inc., 454 Pa. 304, 308-11, 312 A.2d, 592, 594-95 (1973); Coal Operators Cas. Co. v. C.T. Easterby & Co., Inc. 440 Pa. 218, 224, 269 A.2d 671, 673 (1970); Dunn v. Orloff, 420 Pa. 492, 496, 218 A.2d 314, 316, 317 (1966); Boyd Estate, 394 Pa. 225, 233, 146 A.2d 816, 820 (1958); Allinger v. Melvin, 315 Pa. 298, 304, 172 A. 712, 714 (1934); Cohn v. McGurk, 330 Pa. Super. 333, 342, 479 A.2d 578, 582-83 (1984). [FN3] Thus, as a matter of law, I must determine whether Kutner has properly invoked this exception. Gianni, supra, at 324, 126 A.792; O'Brien v. O'Brien, 362 Pa. 66, 71, 66 A.2d 309, 311 (1949).

*3 Clear and convincing evidence of an admission that a writing is not the entire agreement of the parties must rest on the testimony of the party seeking to enforce the contract (i.e., AMC). Scott, supra, at 310, 312 A.2d at 595; Dunn, supra, at 500-01, 218 A.2d at 319 (quoting Universal Film Exchanges, Inc. v. Viking Theatre Corp., 400 Pa. 27, 30, 161 A.2d 610, 617 (1960)). Sworn testimony or pleadings of an enforcing party or disinterested witnesses admitting an incomplete writing satisfies the "clear and convincing" requirement. Boyd Estate, supra, at 231, 232, 146 A.2d at 821. Similarly, a letter admitting a mistake in a bond agreement and reflecting a contrary understanding satisfies the evidentiary standard, Allinger, supra, at 304, 172 A. at 714-15. See also Coal Operators, supra, at 223-24, 269 A.2d at 674 (letter from corporate officer admitting exclusive agency despite contractual provision stipulating nonexclusivity); Yuhas v. Schmidt, 434 Pa. 447, 457, 258 A.2d 616, 621 (1969) (admission made during trial testimony). Testimony failing to clear constitute an admission includes: (1) a letter prepared by one party's attorney and signed by the opposing party, Scott, supra, at

310-11, 312 A.2d at 596; and (2) a statement admitting a nonmaterial variance between the writing as the intent of the parties, Dunn, supra, at 449, 218 A.2d at 320.

My examination of the depositions and exhibits in this case reveals plaintiff has met its burden by clearly showing defendants' agents admitted a prior oral agreement not embodies in the writing. Not only did AMC's Carroll acknowledge the existence of a prior oral agreement, he confirmed the agreement in a letter to his supervisor. In addition, another AMC official (McQuillan) said he and Carroll discussed the oral pledge to Kutner.

In deposition testimony Carroll expressly admits an unambiguous promise to accommodate Kutner's request for territory protection. Following Kutner's demand that AMC eliminate the Philadelphia-Academy dealer "point" so no other dealer would operate in Northeast Philadelphia, Carroll stated:

A. What I told Mr. Kutner is that if he brought to the table the capacities and resources that he indicated he would, that I thought it was only fair that we did not franchise someone in the Academy point immediately and that we would give him time to establish himself in the marketplace and get his dealership operational and off the ground.

... Q. Did you promise Mr. Kutner that you wouldn't appoint another dealer in the Academy area for a one-year period?

A. My recollection is not a specific time frame. I have had the occasion to review a letter that indicates that, that was signed by me, which would lead me to believe that that's what I said. But on sheer recollection, there was not a time frame involved. It was, Mr. Kutner, go do what you got to do; we're not going to go out and find somebody in

Academy; you get your dealership up and running and we'll take a look at how you're doing and how you're penetrating the market, and then we'll review it.

*4. (Plaintiff's Exhibit "C," Carroll dep. at 28-29).

Moreover, Carroll acknowledged that the oral agreement was omitted from the written contract as part of a tradeoff between himself and Kutner for Kutner's oral promise to join an advertising association of AMC dealers and also because of the parties' mutual trust.

Q. Now, your statement that you told me about tc Mr. Kutner, which I'm not going to repeat, but with respect to his request, did you ever put anything in writing to him with respect to his request, did you ever put anything in writing to him with respect to not prospecting the Academy area for a while?

A. I don't believe so. Just like he didn't put anything in writing to me about becoming a member of the advertising association.

You have to understand the tenure [sic] of the moment. We were very pleased to have someone of Mr. Kutner's reputation interested in the franchise, the fact that we tried to get additional grant opening advertising. There were may other things he came to us with after the fact that we tried to accommodate him in every way possible. We expected him to be just a fantastic dealer for us, one of our top dealers in the country. That's what his track records said he was capable of. Our relationship at that point in time was very, very positive, and I believe full of mutual respect for each other's position.

To this day I don't thing Mr. Kutner and I have any problem with each other's work.

(Plaintiff's Exhibit "C," Carroll dep. at 30-31.)

Q. What was Mr. Kutner's reaction to the promise you made to him?

Again I'm not going to recharacterize what you said.

Q. Yes

A. He indicated, after some additional discussions -- I think this whole meeting took probably about an hour. At the end of the meeting he indicated that he was satisfied that we would act in good faith and I indicated the same thing; and at that point in time I thought we were going to be in a position to be able to put together the franchising of Mr. Kutner as an AMC/Jeep/Renault dealer.

(Plaintiff's Exhibit "C," Carroll dep. at 34-35).

Thus, the parties' confidence in each other might explain why they failed to incorporate the oral agreements into the writing. See Yuhas, supra, at 457, 258 A.2d at 621. Carroll's recollection of the oral pledge tracks Kutner's version of why he signed the written agreement despite the inclusion of provisions directly contrary to his goal of exclusivity. Kutner explained his actions as follows:

Q. You eventually received a signed franchise agreement from American Motors in 1981?

A. Yes, we did.

Q. Did you review the terms of that franchise agreement when you received it?

A. Yes, I did.

Q. Did you have any problem with the way the franchise agreement was written?

A. No, because of the assurance. I questioned Mr. Carroll at great length as to the phraseology, and he assured me that legally this is the way they had to do it, but I had no problem; it was all cleared.

Q. Let me be clear on the timing. You questioned Mr. Carroll at great length about the phraseology and the franchise agreement itself.

*5 A. Because I didn't want anything to happen like happened.

Q. Why did you question him? What led you to question him?

A. Because they both were not written out on the franchise.

(Plaintiff's Exhibit "A," Kutner dep. at 28-29).

... A. I questioned the designated point here.

Q. You were pointing to the page headed "Dealer Facilities Reported."

A. That is correct.

Q. The designated point you questioned is "Philadelphia-Northeast"?

A. That is correct.

Q. Why did you have a problem with it saying "Philadelphia-Northeast"?

A. Because it didn't include Academy.

Q. You took that up with Mr. Carroll?

A. Yes

Q. What did Mr. Carroll say?

A. He said that was the way they had to do it, but I was protected. They had to do it that way.

Q. Did he tell you why they had to do it that way?

A. No, he didn't give me the legal reasoning or any other, but he said it had no bearing upon our agreement.

Q. You accepted that?

A. Certainly, particularly since I documented it so many times with so many letters, and constantly everything I did.

(Plaintiff's Exhibit "A," Kutner dep. at 30-31). Kutner therefore, signed the written contract only after Carroll gave him oral assurance of territory protection. Carroll has acknowledged as much, and as a result parol evidence is admissible. See Cohn, supra, at 342, 479 A.2d at 582-83 (parol evidence admissible because: (1) the mortgage contract was signed by party only upon oral presentation of

opposing party; and (2) the opposing party admitted making a prior oral representation).

The only open question in Carroll's mind appears to be how long the oral promise of an exclusive territory would continue, not whether such a pledge was made. Carroll stated:

A. ... what he asked for at that meeting was that his initial request, as I recall, was that we do away with that point [Academy], change the market plan to eliminate that point. That's not specifically what this says [referring to a letter he wrote to his superior on the Kutner deal (plaintiff's Exhibit "B" (P--9)], but I think what this says is that we arrived at, at the end of the meeting. That we would not eliminate the point, but that we wouldn't franchise someone.

Q. You advised Kutner that you discontinued dealer prospecting in the Philadelphia-Academy trade area.

A. My recollection is not that I told him for a year. My recollection--if this says that [referring to the letter], then that's obviously what I must have said. My recollection was it was for an indeterminate period of time that would be based on how long it took him to get established in the marketplace and how well he did penetrating the market.

I would say in my mind it was probably at least a year, knowing what forces he was going to be up against to get established.

(Plaintiff's Exhibit "C", Carroll dep. at 84-85 (bracketed material supplied by the court). See also Plaintiff's Exhibit "D," McQuillan dep. at 50) (Carroll discussed his promise with Kutner, but no specific time was outlined, although "a year's time" was mentioned).

*6 Perhaps most importantly, Carroll confirmed the existence of his promise to Kutner in an October 1981

letter (discussed in the above passage) to his immediate supervisor, Harlan Haywood, in which Carroll wrote:

... Kutner's trade area for Buick encompasses both the Phila-Northeast and Phila-Academy area. The dealer has requested that the Zone not franchise another dealer in the Phila-Academy trade area as he believes that they can satisfactorily penetrate the combined markets. The Zone has advised the dealer that the Zone would discontinue dealer prospecting in the Phila-Academy trade area for a year in order to give the dealer the opportunity to sell into that market without competition from another American Motors dealer located within the Phila-Academy area.

(Plaintiff's Exhibit "B" (P-9)).

Finally, the postagreement actions of Carroll and McQuillan denying a request from another automobile dealer to operate in competition with Kutner in the Philadelphia-Academy area Corroborate Carroll's promise of territorial protection to Kutner. See Z & L Lumber Co. of Atlasburg, supra, at ___, 502 A.2d at 701 (conduct of parties after contract formation indicative of true intent underlying written agreement). Not only did McQuillan state that Carroll informed him of his promise to Kutner (McQuillan dep. at 50), he also acted consistent with Carroll's promise. After another automobile dealer, Potamkin, contacted AMC in mid-1982 seeking a franchise in the Philadelphia-Academy location, AMC denied the request based on its exclusivity pledge to Kutner. McQuillan recalled the transaction as follows:

Q. Let's focus on Potamkin for a minute. Was there a contact from Ed Reitz [of Potamkin] to you in the summer of '82, do you remember that?

A. Yes.

Q. What was that about?

A. It would be very difficult for me to even put a month on the contact, but it was some time in '82 Ed Reitz called me. It was shortly after the time that Potamkin had gone into that Grant/Academy location and said they were interested in our franchise. It think it was in the middle part of '82, some time and it was not a very long conversation at all, but I said we weren't interested in franchising a dealer at the time.

Q. You got a call from Reitz, is that it?

A. Yes, I believe.

Q. Did you discuss this phone call with Bill Carroll?

A. Yes. I believe I mentioned it to Bill, that Potamkin had called me.

Q. Do you remember what his reaction was?

A. If I recall, it was just a very brief conversation and he agreed that we wouldn't do anything, proceed any further with Potamkin or any dealer.

Q. Do you remember the reason?

A. The reason?

Q. Yes.

A. Kutner was fairly new, well within his first year of operation. We had agreed we wouldn't solicit any dealers.

Q. That was the reason.

A. Yes.

(Plaintiff's Exhibit "D," McQuillan dep. at 81-82).

Carroll himself acknowledged AMC's position with respect to other possible franchises in Kutner's territory:

Q. While you were zone manager at Philadelphia, did you in fact, prospect for another agency dealer in the Academy dealer point?

*7 A. No.

Q. Was that because of the promise that you made to Mr. Kutner?

A. Yes.

(Plaintiff's Exhibit "C", Carroll dep. at 34).

On more than one occasion, Carroll characterized his arrangement with Kutner as a promise or a commitment, and not an assertion of his marketing strategy.

Q. Were you aware that a representative from Potamkin called McQuillan with respect to Potamkin filling the Academy area?

A. No, I do not recall that, and McQuillan would not have entertained it because of our commitment to Mr. Kutner.

(Plaintiff's Exhibit "C," Carroll dep. at 55). See also id. at 29, 24-45 (accepting characterization of "promise" without objection).

AMC did not grant a franchise to Potamkin until Carroll departed as zone manager in 1983. Thus, as long as Carroll, the man with whom Kutner negotiated, controlled AMC's Philadelphia operations, defendants honored the Carroll-Kutner arrangement for territory protection in Northeast Philadelphia.

Testimony from AMC officials clearly shows an admission of an oral agreement between Carroll and Kutner. AMC's representations cannot be construed as mere explanations of the corporation's marketing plan. As a result, parol evidence of the oral agreement is admissible. Based on the depositions and exhibits, I conclude that the oral agreement is admissible, and therefore, the written contract does not as a matter of law dictate summary judgment for defendants. Nor does the oral agreement entitle plaintiff to summary judgment. If anything, the oral agreement gives rise to material issue of disputed fact concerning the duration of AMC's promise to provide Kutner with territory protection for his AMC franchise in the Philadelphia-Northeast area. Officials representing both parties have varying recollections concerning the time limits of the exclusivity promise.

Kutner contends that the agreement was for the life of the written agreement. AMC officials, such as Carroll and McQuillan, say the agreement was for at least a year, but possible for an indeterminate period.

If the agreement was for only one year, AMC would be entitled to summary judgment because the oral pledge would have expired before AMC awarded the Philadelphia-Academy franchise to Potamkin in 1983. At that point, the writing would have been the government document and, as even Kutner acknowledged in his deposition, the written contract limits Kutner to the area known as Philadelphia-Northeast, not the entire Northeastern section of Philadelphia. Nevertheless, if, as AMC officials admit is possible, the oral agreement extended beyond one year, AMC may very well have breached its promise to protect Kutner's territory. Thus, this disputed factual issue requires a jury determination concerning the duration of the oral agreement between the parties. Based on the available evidence, a jury could reasonably infer that a material issue of disputed fact exists. See Graham v. F.B. Leopoled Co., Inc., 779 F.2d 170, 173 (3d Cir.1985) (appropriate inquiry on summary judgment motion is what jury could reasonably infer). [FN4] Therefore, for the reasons stated above, I deny the cross-motions for summary judgment on Count I of plaintiff's complaint.

ORDER

*8 AND NOW, this 2 day of October, 1986, upon consideration of the motion for partial summary judgment of defendants American Motors Corporation and American Motors Sales Corporation and the cross-motion for partial summary judgment of plaintiff, Kutner Buick, Inc., it is hereby ORDERED that pursuant to Fed.R.Civ.P. 56, both motions are DENIED.

FN1. Counts II and III of plaintiff's complaint, neither of which are at issue in this motion, relate to fraud and a warranty dispute.

FN2. Because of a corporate restructuring within AMC, the October 1981 contract was superseded by a new agreement in January 1982. The reason for the new contract is irrelevant to the issues raised in the motions presented in this proceeding.

FN3. Federal courts applying Pennsylvania law have also recognized this exception to the parole evidence rule. See, e.g., Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146, 150 (3d Cir. 1974). See also Contractor Utility Sales v. Certain-teed Products, 638 F.2d 1061, 1081 (7th Cir. 1981).

FN4. Because I have concluded that defendant's acknowledgement of a prior oral agreement permits the admission of parol evidence, I need not address whether parol evidence could be admitted to clarify any ambiguous terms. Nevertheless, as a matter of law, I reject plaintiff's contention that the contract provisions dealing with market area and the nonexclusivity clause are ambiguous. Contrary to plaintiff's claim that the market area provision is ambiguous, Kutner's deposition demonstrates he understood the distinction between the Philadelphia-Northeast and the Philadelphia-Academy areas and he knew the geographic region known as Northeast Philadelphia is divided into these two ares for purposes of franchise awards from AMC. (See Plaintiff's Exhibit "C," Kutner dep. at 26 & 30-31). Moreover, I conclude that plaintiff's alternative interpretation of the nonexclusivity provision is

speculative and unsupported by any objective evidence. Mellon Bank, supra, at 1011. Plaintiff's suggested reading seeks to mischaracterize the writing, Polish Amer. Mach. Corp. v. R.D. & D. Corp., 760 F.2d 507, 513 (3d Cir. 1985), and is without merit, especially in light of Kutner's status as an experienced and successful automobile dealer acting on the advice of counsel.